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CASES

ARGUED AND DETERMINED

IN

THE COURT

FOR

THE TRIAL OF IMPEACHMENTS

AND

CORRECTION OF ERRORS,

IN

THE STATE OF NEW-YORK.

BY GEORGE CAINES,
COUNSELLOR AT LAW, AND REPORTER TO THE STATE.

VOL. I.

NEW-YORK:
Printed and published by I. Riley.
.....
1810.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the eighteenth day of January, in the twenty-ninth year of the Independence of the United States of America, GEORGE CAINES, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figure following, to wit:

"Cases argued and determined in the Court for the Trial of Impeachments and Correction of Errors, in the State of New-York. By GEORGE CAINES, Counsellor at Law, and Reporter to the State. VOL. 1."

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EDWARD DUNSCOMB,
Clerk of the District of New-York.

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PREFACE.

THE Decisions now offered to the Public, are the Judgments of a Court of dernier resort, and of the highest importance. To be acquainted with determinations of inferior Tribunals, would be of scarcely any utility, if those of this were unknown. It is from hence we are to receive the Supreme Law of the land: for such its opinions may well be termed; because, however our Legislature may enact and ordain, whatever is thus enacted and ordained, is here, in almost all cases, to be expounded and enforced. It is here that the worth of the adjudications of every other Court, is to be ascertained. It is in this mint they receive their stamp, and sterling value. The endeavours, therefore, of the Author have been directed to collect as many of the antecedent Decisions of the Court of Errors (for, thank God! it is not yet known as one for the trial of Impeachments) as he possibly could. Those now obtained will form an introductory part to the present number. So, what may be in future acquired, will precede the Reports of the year, and though this extension of the original plan will naturally demand an increase of price, the already experienced liberality of the Bar is, on this point, a sufficient guaranty that the Work will not on this account be the less acceptable. The Determina-

tions now prefixed to the Cases reported by the Author, have been furnished by the kindness of THOMAS R. GOLD, Esq. and were adjudged while he was in the Senate. The opinions he read, are given as those of the Court, and, though expressed in his language, contain the principles on which the Cases were decided.

GEO. CAINES.

New-York, December, 1804.

CASES

ARGUED AND DETERMINED

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

CORRECTION OF ERRORS

IN THE

STATE OF NEW-YORK:

FEBRUARY, 1801.

Herman Le Roy, William Bayard, and Gerritt Boon, } *Appellants,*

against

Peter Servis, Peter Little, Samuel Runyions, James Warren, and others, } *Respondents.*

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Where there are several complainants to a bill praying an injunction, an affidavit by one alone, showing probable cause for equitable interposition, is sufficient; and a

THE appellants filed their bill in chancery, stating, that in 1768, *Peter Servis*, and twenty-four others, presented to Sir *Henry Moore*, formerly governor of the province of *New-York*, a petition, praying him, for their use, to purchase from the *Oneida Indians* 25,000 acres of land, then in the county of *Albany*, but now in that of *Herkimer*, and to grant them letters patent for the same. That for money, or some other

demurrer that all have not joined is bad. Whether our courts will entertain a plea that a contract is illegal, because in contravention of the royal instructions respecting grants of lands to patentees? *Qy.* A demurrer to a bill, because seeking a discovery of that which would subject to the penalties of the act against buying pretended titles, is bad, unless it appear the answer would show a *scienter* of the seller's being out of possession, and a subsisting adverse possession. If a plaintiff be properly before the court of chancery for a discovery, he may pray relief, and a demurrer to the whole bill on that account, is bad.

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valuable consideration (not particularly known to the complainants) paid, delivered, or performed, by Sir *William Johnson*, formerly of the county of *Tryon*, deceased, and on consideration that he would pay all the office and other fees, on issuing the letters patent, the petitioners agreed with him, that, on their obtaining a grant for the said 25,000 acres, they would hold the same in trust for him, and duly convey

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*the whole to him in fee. That in the year 1769, letters patent were issued for the above lands, in favour of the petitioners, the office and other fees whereof Sir *William Johnson* paid; upon which, the patentees did, for the considerations aforesaid, and in pursuance of their said agreement, by sufficient deeds in the law, grant, release, and convey the said 25,000 acres of land, to the said Sir *William Johnson*, in fee-simple, by virtue of which the said Sir *William Johnson* took possession thereof, caused the same to be surveyed, and trees to be marked in the boundary lines thereof. The bill then set forth a regular chain of title, from Sir *William Johnson*, for 23,000 acres; and also, that after the death of Sir *William*, and early in the war between the *United States* and *Great Britain*, Sir *John Johnson*, the son, and one of the executors of Sir *William*, had the custody of the conveyances from the patentees, and to guard against their loss, or for some other reason, buried them in the earth, by means whereof they were either wholly lost, or rendered illegible, and were therefore altogether out of the power of the complainants. That *Peter Servis* and the other defendants, endeavouring to avail themselves of the loss or destruction of those conveyances, and claiming title to the said lands, had brought actions of ejectment for them, wherefore they prayed a discovery, an injunction to stay proceedings in the several ejectment causes, that the complainants might be quieted in their possession, and that such other and further relief might be afforded, as was agreeable to equity and good conscience. To the bill was annexed an affidavit of the appellant, *Gerritt Boon*, swearing, that, according to his knowledge, information, and belief, the material facts charged

were true, and that, according to his information and belief, the deed or deeds from the patentees to Sir *William Johnson*, was, or were lost or destroyed, as in the bill was set forth. To this some of the defendants demurred, and assigned for reasons, 1st. That the complainants ought to have made affidavit, that they had not in their power or custody the deed or deeds, concerning which they seek a discovery, and for the loss whereof they pray relief. 2d. That the agreement between Sir *William Johnson* and the patentees, as set forth in the bill, was illegal, and not entitled to the aid of a court of equity. 3d. That the bill charged that the defendants claimed by conveyances *executed by * v
persons out of possession, and that a discovery of that fact would subject the defendants to a penalty. 4th. That the complainants prayed a discovery of the defendants' title, and to be quieted in possession, before the title of the complainants was established at law. 5th. That the title of the complainants, as set forth in the bill, was merely triable at law, where it might be fully ascertained and established, if it was as stated to be. Lastly. That the bill contained no equity. These, they contended, were good reasons for demurrer; 1st. Because, where it is intended to obtain any specific relief, upon the loss of a particular deed, and thereby give to chancery a jurisdiction to which it would not otherwise be entitled, in exclusion of the common law, it becomes necessary that the party complainant should annex a satisfactory affidavit to his bill, to inform the court of the loss he complains of, and the necessity of equitable interference. 2d. That such affidavit ought, in the present case, to have been made in different terms, or by all the complainants. *Gerritt Boon may have been informed*, and *may verily believe*, and *may hope to be able to prove*, as he states in his affidavit, that the petitioners named in the bill of complaint did respectively convey all their right, title, and interest to Sir *William Johnson*, and may also *have been informed, and verily believe*, that the deeds were destroyed, as alleged; yet the other plaintiffs may not believe any such matter, and

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may actually have evidence to the contrary, or possess the deeds about which they were inquiring. 3d. That there was not any necessity for changing the jurisdiction from law to equity; for the complainants, if the aid of chancery was wanted for discovery *only*, might have the benefit of it on a bill confined to that object. 4th. That the title of the complainants, if any, was a legal title, and that if *Gerritt Boon* were able to prove (as he swears he hopes to do) the conveyances to Sir *William Johnson*, even a discovery would not be wanted. 5th. That if any one of these reasons is good cause of demurrer, the cause must be regularly out of court.

The Chancellor having allowed all the demurrers respectively, and ordered the complainants' bill to be dismissed, with costs, as to the demurrants, the cause now came before the court on an appeal from that decision. After hearing argument, the court resolved, 1st. As to the first point, * vi that the *authority of precedent was wanting to give it sanction, no sufficient reasons having been assigned, to induce the court to sustain it; that on the contrary, considerations, resulting from inconvenience in all, and utter impossibility in many cases, afforded just grounds for repelling the exception. 2d. That it is considered, no decree on the merits of the complainants' case is ever made on the evidence contained in the affidavit annexed to the bill; but that as such affidavit is merely to present probable or colourable grounds, for chancery interference and examination, there could be no hesitation in saying, that the affidavit of *Gerritt Boon* was sufficient in terms for *that* purpose; and that the exception taken to it must be disallowed. 3d. On the second cause of demurrer, objecting illegality to the alleged agreement between Sir *William Johnson* and the original patentees, in contravening the salutary principles upon which the instructions of the royal government, regulating colonial grants, were grounded, it is sufficient to say, it has been justly admitted, that this is highly delicate ground; and that the principles of this objection, if allowed, must attach to it very controlling consequences, upon questions of real pro-

perty in the state; but, on consideration, this does not appear to be included in that class of cases, which have been affected by the principle resorted to, the general consequences of which, in its operation, if sanctioned by this cause, to the prejudice of *bona fide* purchasers, probably without *notice*, is an argument why it ought not to be extended. 4th. The third cause of demurrer urges, that the discovery prayed, would endanger the defendants in law, and subject them to a penalty. On this point, as a *scienter*, or knowledge of the seller's being out of possession, and a subsisting *adverse possession*, at the time of the sale, are necessary to constitute an offence against the statute alluded to, the answer to this part of the bill, disclosing the fact prayed, might be so drawn, as not to contain any admission which would endanger the defendant in law. 5th. The remaining objection is, that the complainants blended in their bill *relief* with a prayer for *discovery*, when, from aught appearing in the case, a court of law, upon the discovery being obtained, is competent to afford adequate redress. As the Chancellor's retaining jurisdiction on the *point of relief* in this cause, would involve a consideration of the trial by jury, the question presents an aspect peculiarly *important. On this point, * vii
though there may be sufficient grounds disclosed to change the jurisdiction, yet, as the complainants were properly before the court upon the point of *discovery*, the defendants were bound to answer this part of the bill; and the demurrer, therefore, to the whole, was not well taken, and ought to have been overruled. The cases on this question are contradictory. The law is not bound down by a series of uniform decisions, in a manner not to be shaken, and so as to preclude the consideration of the reason of the rule. Upon this last ground, the reason of the rule, it will be seen, that a decision in conformity to the above opinion will, at the same time that it discountenances the doctrine of *turning round* the suitor upon nice and critical exceptions, operate no prejudice to the defendants upon the merits of the question; because a judgment, overruling a demurrer in chan-

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cery is, in its effects, in nature of a *respondeas ouster* in a court of law. The opinion of the court, therefore, is, that the causes assigned do not sustain the decree in this cause, and judgment of reversal must be entered.

Andrew Vos and John Boonen Graves *against* The United Insurance Company.

A mere sailing for a port understood to be blockaded, is not a breach of neutrality so as to affect a policy of insurance.

IN error from the supreme court. The special verdict on which judgment was rendered, contained the following facts. On the 21st *June*, 1798, the defendants, for *Vos* and *Graves*, insured eight thousand dollars on the *American* brig *Columbia*, from *New-York* to *Amsterdam*, at a premium of 17 1-2 *per cent.* At this time neither party knew the *Texel* was blockaded. It was warranted in the policy that no loss should arise to the defendants, by reason of capture, seizure, or detention, in the port of *Amsterdam*, the *Texel*, or the *Vlie*, and that the cargo was *American* property. The plaintiffs for an additional premium of two and a half *per cent.* obtained liberty from the defendants, to touch and trade at *Hamburgh*, which was granted, in consequence of the following letters written to the defendants.

"*New-York*, 25*th June*, 1798.

"SIR,

"The cargo of the brig *Columbia*, *Benjamin Weeks*, master, being insured at the *New-York Insurance Company*, *at and from hence to *Amsterdam*, on the 14th instant, and the accounts daily receiving, rendering motives of precaution extremely necessary; we therefore propose to order the vessel to touch at *Hamburgh* for orders, which may be done without delay, as she is to go north about, *provided you will permit it in the policy without any additional premium:* And should our friends advise that it would be dangerous

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to proceed to *Amsterdam*, *in that case* the risk should end at *Hamburgh*.

" We are, &c. " VOS and GRAVES.

" *To the President of the United Insurance Company.*"

THE SAME TO THE SAME.

New-York, *27th June*, 1798.

" SIR,

" On being informed that the *Texel* was blockaded by the *English*, and a ship from *Philadelphia*, bound to *Amsterdam*, had actually been sent to *Yarmouth*, we applied to you yesterday to obtain leave for the brig *Columbia* to touch at *Hamburgh* for orders. From this circumstance we conceive it highly interesting to the office, to grant the permission without the charge of an additional premium. At any rate we would rather have the vessel proceed on as the policy now stands, than to augment the premium; for the circumstance of the blockade *was unknown to us*, when the insurance was effected, and it is probable it may be *withdrawn by the time the vessel reaches Amsterdam*."

The plaintiffs had property on board to the amount of the sum insured. They also owned the brig, which, with the cargo, was *American* property. The brig sailed on the voyage insured, and arrived at *Cruxhaven*, on her way to *Hamburgh*, in *August*, 1798. In three or four days after, she sailed from *Cruxhaven* for *Amsterdam*. On the day she left *Cruxhaven*, she was captured by a *British* frigate, and carried into *Yarmouth*. The brig and cargo were libelled in the High Court of Admiralty of *England*, and were condemned by Sir *William Scott*, who pronounced the following sentence. " There is pretty clear proof of neutral property in this case, both of the ship and cargo; but the vessel was taken attempting to break a blockade. It is necessary for me to *observe, that there is no rule of the law of nations * ix
more established than this, that the breach of the blockade

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subjects the property so employed, to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed; it is to be found in all books of law and in all treaties; every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments, who possess any degree of civil knowledge. This vessel came from *America*, and, as it appears, with innocent intentions on the part of the *American* owners; for it was not known at that time in *America*, that *Amsterdam* was in a state of investment; and therefore there is no proof immediately affecting the owners. But a person may be penally affected by the misconduct of his agents, as well as by his own acts: and if he delegates general powers to others, and they misuse their trust, his remedy must be against them. The master was by his instructions to go *north about* to *Cruxhaven*. This precaution is perhaps liable to some *unfavourable* interpretation: the counsel for the claimant have endeavoured to interpret it to their advantage; but, at the best, it can be but a matter of indifference. When he arrived at *Cruxhaven*, he was to go immediately to *Hamburgh*, and to put himself under the direction of Messrs. *Boue & Company*. They therefore were to have the entire dominion over this ship and cargo. It appears, however, they corresponded with persons at *Amsterdam*, to whom farther confidential instructions had been given by the owners; and these orders are found in a letter from Messrs. *Vos & Graves*, of *New-York*, to *Boue & Company*, informing them, that the *Columbia* was intended for *Amsterdam*—consigned to the house of *Crommelin*, to whom *Boue & Company* are directed to send the vessel on, "*if the winds should continue unsteady, and keep the English cruisers off the Dutch coast:*" if not, they were to unload the cargo, and forward it by the interior navigation to *Amsterdam*. *Boue & Company* accordingly direct the master "to proceed to *Amsterdam*, if the winds should be such as to keep the *English* at a distance." There is also a letter from the master to *Boue*, from

Cruxhaven, in which he says, "*Amsterdam* is blockaded." We have this *fact then, that when the master sailed from *Cruxhaven*, the blockade was perfectly well known both to him and the consignees: but their design was, to seize the opportunity of entering whilst the winds kept the blockading force at a distance. Now, under these circumstances, I have no hesitation in saying, that the blockade was broken. The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade: but the blockade is not therefore suspended. The contrary is laid down in all books of authority; and the law considers an attempt to take advantage of such an accidental removal, as an attempt to break the blockade, and as a mere fraud." But it has been said, that by the *American* treaty, *there must be a previous warning*. Certainly where vessels sail without a knowledge of the blockade, a notice is necessary; but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of this blockade; and, therefore, they are not in the situation which the treaty supposes. It is said also, that the vessel had not arrived; that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion, that the sailing with an intention of evading the blockade of the *Texel*, was beginning to execute that intention; and is an *overt act* constituting the offence. From that moment the blockade is fraudulently invaded. I am, therefore, on full conviction, of opinion, that a breach of blockade has been committed in this case; that the act of the master will affect the owner to the extent of the whole of his property concerned in the transaction. The ship and cargo belong, in this case, to the same individuals, and therefore they must be both

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involved in the sentence of condemnation." The mate, on his examination as a witness in the cause, deposed—"That it was generally understood among the *Americans* at *Cruxhaven*, at the time the *Columbia* sailed from thence, that *Amsterdam* was considered as a blockaded port, and it was so understood by himself and the captain *of the *Columbia*; that the *British* ship, upon falling in with the brig, immediately seized her as being bound to a blockaded port, and also, on the pretext of her having *Dutch* property on board; that it was generally understood by the *Americans* at *Cruxhaven* at the time the *Columbia* left it, and it was understood by the captain and him, that it was the practice of *British* cruisers to stop vessels bound to *Amsterdam*, and send them back without seizing them, and only to seize in case of a second attempt to enter *Amsterdam*; and that under this idea, the captain sailed for *Amsterdam*." When it was generally believed in the city of *New-York*, that *Amsterdam* was blockaded, to wit, on the 18th of *September*, 1798, the defendants insured the *American* ship *Patriot*, from *New-York* to *Amsterdam*, with liberty to touch at *Altona* within one mile of *Hamburgh*, for 17 1-2 *per cent.* to return 2 1-2 *per cent.* if the voyage ended at *Altona*.

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Upon the facts thus found, the majority of the court gave judgment for the defendants, for the reasons assigned in the two following opinions, delivered by Mr. Justice *Kent* and Mr. Justice *Radcliff*.

KENT, J. On these facts two questions arise: 1. Will a voluntary attempt by the captain to break a blockade be sufficient to destroy the right of recovery on the policy? 2. If it will, is there the requisite evidence in this case of that attempt? In answer to the first question, I am of opinion that such an attempt takes away from the assured his right to recover; for he can never be allowed to indemnify himself upon an innocent party, from the consequences of his own want of skill, or from his negligence or folly.

The act of the master must be referred to his principal, who appoints him; and whenever a loss happens through the master's *fault*, unless that fault amount to barratry, the owner, and not the insurer, must bear it. It is a fault in the master, to occasion a loss of property, from his carelessness, or want of competent skill; and much more is it the case, if he *wilfully* occasion that loss, as by resisting search, breaking a blockade, &c. He is charged with a discreet and faithful execution of his trust, and it is against his *duty* to expose the property unnecessarily to risk, either from natural perils, or from perils arising from the violation of his neutrality. It is a point not to be disputed, that an attempt *knowingly to break a blockade, is a violation of neutral duty, and occasions a forfeiture of the property; and it cannot be supposed, unless it be so expressed, that the insurer takes upon himself such risk. The risk of fault in the master (barratry excepted) is not a risk enumerated in the policy; and it would be very unreasonable, that the insurer should be holden beyond his *express* undertaking, for the fault or folly of the master, whom the insured selects and controls.† In answer to the second question, I have no doubt in concluding, there is sufficient evidence in the case of a wilful attempt by the captain to break the blockade of *Amsterdam*. This evidence results from the condemnation in the *British* court of admiralty; and for the conclusive effect of that sentence, I refer to my opinion in the causes of *Vandenheuvel* v. *The United Insurance Company, and Church*. There is also sufficient evidence, without resorting to the sentence. When the captain left *Cruxhaven*, he sailed *with the understanding* that *Amsterdam* was a blockaded port; and he sailed also under the idea, that if he should meet with a *British* cruiser in his attempt to enter *Amsterdam*, he would, for the first attempt, be sent back, and not seized. This appears by the testimony of the mate, and it is sufficient to establish the *fact* of the blockade, as against the plaintiffs, (it being the admission of their master,) until they repel it by direct proof to the contrary. But

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† *Millar*, 136 to 144. 179 to 188. 2 *Valin*, 77. 79. 161. 650.

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there is no such contrary testimony in the case. It would seem, indeed, to be implied, from some of the observations of Sir *William Scott*, which are thrown into the case, that winds had occasionally *blown off*, or *kept at a distance*, the blockading squadron, but at what precise *time*, or to what precise *distance*, does not appear. We do not know, except by necessary deduction from the testimony of the mate, what was the actual state of the blockade, or how far the *British* cruisers were at the time in a situation to preserve it. Nor do we know the situation the vessel was in, or her proximity to *Amsterdam*, when she was captured. The mate informs us only, that the master understood when he sailed from *Cruxhaven*, that *Amsterdam* was blockaded; that he sailed with an intent to attempt to enter it, and with the understanding that for his first attempt he would only be sent back, and that he was captured the day he sailed. How near he had approached the coast of the *Vlie* and *Texel*, we do not know. He might have reached the coast, for it is

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*within the reach of a day's sail. Every reasonable conclusion that the admissions of their mate will warrant, is, however, to be drawn against the plaintiffs, so long as they furnish no other proof to explain or repel those admissions. My opinion accordingly is, that the existence of the blockade, the wilful attempt of the master to break it, his capture while executing that attempt, and at no great distance from, if not in, the neighbourhood of the blockading port, are all necessarily to be inferred from the case, and that judgment ought, therefore, to be given for the defendants.

Radcliff, J. On the 21st *June*, 1798, the date of the policy, neither party knew of the investment of *Amsterdam*, and this excludes the idea, that, by any special agreement or understanding, the insurance could have been meant to extend to any peril, for breach of the particular blockade in question, if any existed. 1st. It is a settled rule, that the insured, in order to comply with his warranty, must not

only maintain the property to be neutral, but so conduct himself towards the belligerent parties, as not to forfeit his neutrality; he must pursue the conduct and preserve the character of a neutral. This being the import of the warranty, and the condemnation being founded on a breach of neutrality, it operates to preclude the plaintiffs, on the principles adopted with regard to the effect of foreign sentences, in the case of *Vandenheuvel* v. *The United Insurance Company*. 2d. In the present case, the plaintiffs, before the vessel sailed from *New-York*, to wit, on the 27th *June*, in consideration of law, had notice of the blockade. This appears by their letter to the defendants of that date. Although the information was not then certain, it was sufficient to excite serious apprehensions, and to put *them on their guard*, which, in judgment of law, is deemed competent notice.† The captain, however, before he sailed from *Cruxhaven*, had actual notice of the blockade; and there can be no doubt but the plaintiffs are liable for his acts. He sailed with the professed intent to evade it, if an opportunity should offer, but under an idea that, by the treaty of 1794, he was entitled to notice to desist, and to be sent back on the first attempt. The provision in the treaty on the subject, it is obvious, cannot apply to a case where the party *already possesses* the requisite information. This is the rule in all cases where a party is to be affected by notice. But it is objected, that *the captain was not in the act of breaking the blockade; that it existed merely *in intention*, and he was therefore not liable to seizure. If this idea be correct, then no such capture can be lawful, until the line of blockade be actually invaded. The resolution may be formed and acted upon, and no progress in the execution of it can be stopped or prevented till the *breach be made*. A construction so forced and limited, appears to me inconsistent with an effectual exercise of the right. It may be difficult to define its precise extent, but it is more reasonable to adopt the rule, that the besiegers are entitled to take *preventive* measures; and that, where the resolution to break a blockade is form-

† 1 *Atk.* 490. 2 *Fonb.* 155.

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ed, and *begun to be executed*, within a reasonable distance to render it practicable, the offence is incurred, and the party liable to seizure. Such was the case in the present instance. From the testimony of the mate, as well as from the sentence, it appears, that an actual blockade was understood at the time to exist; as a fact, it seems not to have been questioned. But the particular situation of the blockading force does not appear, nor do I think it material. Although the party may have intended to avail himself of an *accidental* interruption occasioned by winds and tempests, this intent will not excuse him, for such interruption cannot be considered as destroying the existence of the blockade. At least, if he attempts to enter under such circumstances, it is at *his peril*, and he subjects himself to the *hazard of seizure and confiscation*. I think the reasoning of Sir *William Scott*, whose opinion is contained in the sentence annexed to the case, is satisfactory, and that the sentence on the merits was right, and of course, that the plaintiffs have forfeited their neutrality, and ought not to recover on the policy, admitting the sentence open to investigation. Neither is he entitled to recover the premium, because the risk had actually commenced, and the warranty was forfeited by a subsequent breach of neutrality.

Against this judgment, on behalf of the plaintiffs in error, *Brockholst Livingston* argued that it was erroneous, because the defendants assumed every risk attached to an attempt to enter a blockaded port; because the condemnation of the High Court of Admiralty of *England* is manifestly unjust.—The defendants understood the *Columbia* was going to a port supposed to be in a state of blockade, and therefore insured the plaintiffs against a seizure and condemnation on
* xv that, as *well as any other account. This appears from the policy, from the additional premium, and from the correspondence. The policy is to *Amsterdam*. This was effected without suspicion of a blockade. The risk, therefore, as to the future state of that city, fell upon the assurers. If news of the blockade had been received the next day, the

plaintiffs were not bound to break up the voyage. The insurance being *at* and from *New-York*, the underwriters could not be compelled to refund any part of the large premium which was paid. The plaintiffs, thus circumstanced, were not obliged to unload their vessel, or be at the expense of a new insurance to another place; without saying a word, they might have gone on, and if taken, even *in an attempt to enter*, the defendants must have paid. Thus a merchant who, in peace, warrants his property neutral, does not insure against future events, or engage the goods shall so continue the whole voyage. If war break out the next day, he is still covered.† The insurers, in the words of Lord *Mansfield*, "take upon themselves all future events and risks, from men of war, enemies, detention of princes," &c. &c. An insurance to a blockaded port is not within the description of unlawful contracts. The laws of the *United States* do not prohibit such commerce. If publicly known that an *American* vessel was going to a port in that state, no measures would be used to stop her, nor would a seizure or forfeiture in this country follow. The law of nations permits the same thing, but the vessel may be seized as prize, by the surrounding squadron, if taken in an attempt to enter. By this is intended, that the law of nations attaches no illegality to the bare inception of such a voyage, unaccompanied by a subsequent attempt to enter. If it be true, that after the report of a blockade reached *New-York*, the plaintiffs might have proceeded without saying any thing to the company, their case is greatly fortified. The increased premium which was exacted of them, shows a blockaded port was contemplated. The assured, with good faith, and to avoid a greater risk to the other party than may at first have been designed, immediately announce to them the intelligence of a probable blockade—and ask permission to direct the *Columbia* to touch at *Hamburgh*. This became necessary to prevent a deviation. Here was an opportunity afforded to the underwriters of offering to cancel the policy, *or of consenting to the vessel's going to *Ham-*

† See *Furtado* v. *Rogers*, 3 *Bos. & Pull.* contra.

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more admires the bold, eloquent, and yet perspicuous language in which his opinions are uniformly given. In the cases decided by Sir *William Scott*, the mind finds relief from the fatigue and disgust which it contracts by a review of the iniquitous conduct of other admiralties, which present one uninterrupted scene of rapine and oppression. But without pretending to derogate from his character or abilities, I cannot think the condemnation of the *Columbia* authorized by the law of nations, or the treaty *between the two countries. It will not be denied that an attempt to enter a blockaded port is prohibited to neutrals. Such interdiction is inevitable. Blockades would become idle ceremonies, were all the world permitted, as at other times, to enter the harbour and succour the besieged. The investing foe therefore is permitted to interrupt such entrance, and to confiscate property taken in the attempt. But this being a right, in restriction of those of neutrals, who are to suffer as little as possible by the hostilities of others, ought not to be enforced, unless where a blockade *actually and completely* exists. If the squadron be accidentally absent or blown off, neutrals are restored to their rights, and exempt from the penalty, which in the other case they incur. Who can say the fleet will ever return, or the blockade be renewed? If a neutral can take advantage of this temporary suspension of the blockade, whether produced by necessity or choice, he should not suffer for the attempt. If the blockade be raised, whether by the appearance of a more powerful foe, or by the act of God, it no longer continues, and the port becomes open to all the world. If superior force confers a right to impose on neutrals this restraint, they in turn, without any imputation of fraud, are restored to the privilege of a free trade, the moment the ships are removed, and have a right, if they can, to take advantage of such removal. The *Columbia*, it will be remembered, was captured by a vessel not belonging to the blockading division. Where the squadron was at this time, whether blown off or not, does not appear; at any rate, it will be allowed, that Sir

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William Scott's interpretation of this right, as it respects neutrals, is very rigorous. But, without combating this construction, we say, the *Columbia* ought not to have been forfeited. To justify a confiscation for a breach of blockade, there should be notice of its existence, an attempt to enter, and, under the *British* treaty, a turning away, and a second attempt to go in. Sir *William Scott* admits the necessity of a notice, and a warning not to enter. *Rob. Rep.* 124. What then shall amount to notice? Will a mere report justify a master, who has signed bills of lading for one port, in going to another? Suppose his information incorrect, and a loss happen, will it not be a deviation? Would not the owners and shippers in that case lose their insurance, and he be responsible to both? The *obstinacy of a *Danish* master, in the case of the *Henric* and *Maria*, mentioned in the first volume of *Robinson's Reports*, evinces what was his sense of duty in a similar emergence. Being warned by an *English* ship not to go to a *Dutch* port, he answered, that "he must proceed *according to his bills of lading*, that he could not answer to his owners not to go to any place but *Holland*." In our case, no such warning is pretended. It is admitted by the judge, that the *Columbia* left *America* "with innocent intentions on the part of the owners;" for, says he, "it was not known at that time in *America*, that *Amsterdam* was in a state of investment, and therefore there is no proof immediately affecting the owners." After this concession, we contend that nothing short of being *turned away*, could justify the captain in not proceeding to *Amsterdam*. A contrary rule would lead to great embarrassment, and put it in the master's power to break up a voyage on light rumours, or very imperfect accounts of a blockade. If aught, short of actual turning away, be sufficient, it should be settled with precision, what species of notice or information shall justify a captain in going to some other port? Whether such notice must proceed from one of the blockading ships, or may come from any other quarter? Whether such an interruption will justify an abandonment

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to the underwriters? And who is to sustain the loss, the merchant or assurer, in case none or a bad market offers at the port into which the vessel is compelled to go? To avoid these difficulties, it is settled that nothing short of an *attempt to enter* justifies a seizure. "If I lay siege to a place, or only form the blockade," says *Vattel*, "I have a right to hinder any one from *entering*, and to treat as an enemy whoever *attempts to enter* the place, or carry any thing to the besieged without my leave." *Vattel*, b. 3. c. viii. s. 117. A mere intention, or sailing with such view, is not sufficient—an intention to commit an offence is not punishable. Sir *William Scott* incautiously considers "the sailing with an intention of evading a blockade, an *overt act*, constituting the offence." It would be quite as correct to term a preparation of poison, with an intent to kill, an *overt act* of murder. As in the latter case, remorse or fear may arrest the career of the assassin; so in the other, if the blockade is found to exist when the vessel approaches, the master may *change his course without infringing on the rights of the enemy. It is important that Sir *William Scott* admits the offence here, consisted only in *intention*. An attempt to enter, is not pretended. This also appears from the verdict. The seizure was made on the very day of the *Columbia's* departure from *Cuxhaven*. The distance thence to *Amsterdam* does not appear. If it be once granted that a vessel, the moment of weighing anchor with an intention of going to a blockaded port, may be seized, as was done here, where are we to stop? If it be rumoured in *New-York* that *Calcutta*, *Batavia*, or the *Isle of France*, be in a state of blockade, shall no vessel in the *United States*, laden for either of those ports, set sail until its termination be formally announced? What injury is done to the powers at war, if a hundred of our vessels sail with an intention of going thither, and yet turn away, if the coast be not free? The fleet are stationed there to prevent vessels from entering. If none attempt to pass, the object of the blockade is accomplished. The *Columbia's* intention to go up the *Texel* would not injure the

British. If they were at its mouth they would obstruct her course. If not there, they had no cause to complain. The captain certainly had no design to persist, if a blockade existed. Take his intentions collectively, instead of forming the *overt act* which has been mentioned, they bespeak a perfectly innocent conduct on his part. If the fleet had disappeared, from whatever cause, before his arrival, with great deference, I should not think it very criminal in captain *Weeks* to have gone to *Amsterdam*. The law of nations did not require him to cruise off the *Texel*, to ascertain whether the blockade would be resumed. But the master knew of the blockade when he left *Cuxhaven*. True: And "*he and all the Americans* there, understood it to be the practice of *British* cruisers to stop vessels bound thither, and send them back, and only to seize in case of a *second* attempt to enter, and under this *idea* it was, he sailed for *Amsterdam*." Nothing blameworthy can be inferred from this conduct. As it regarded the underwriters, he had a right to go to *Amsterdam*, although blockaded; such being the true understanding of the parties, as is confirmed by the several insurances which were effected in *New-York*, after it was known the investment of that place was formed. From this may be collected the sense of our *merchants on a point which has been decided with so much severity against them. Their understanding is, that sailing with an *intent* to go to a blockaded place, is no cause of forfeiture. As it respected his owners, it was the master's duty to be better informed than he was at *Cuxhaven* of the situation of the *Texel*. The reports there might be ill-founded. As the voyage did not begin there, he was right in going on. As it concerned the *British*, no wrong would be done to them. The squadron, if there, could easily send him away; if not, their rights could not be impaired. By the *British* treaty, captain *Weeks* was authorized to act as he did. He should have been turned away, and not seized until he made a *second* attempt. This was his conception of the treaty, and it was accurate. Although the obligation of

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such warning be confined to vessels whose masters knew nothing of the blockade at the time of sailing, yet, as the nature of this knowledge or notice is undefined, it is the safer construction to say, that no report, or any information short of a formal notification to foreign ministers, which usually takes place, shall be deemed sufficient. But, rejecting this interpretation, it is not alleged that the owners knew of the blockade when the *Columbia* sailed from *New-York*. The contrary is admitted by Sir *William Scott*. This then being the inception of the voyage, brings her case within the letter of the treaty, so that nothing short of a warning, and a second attempt to enter, should have exposed her to confiscation. I forbear to make any remarks on the conclusiveness of this sentence, as between the parties to this suit. As to its direct effect on the vessel and goods, it is and will remain so. Were the *Columbia* and her cargo now lying in the harbour of *New-York*, the former owners could not touch them. The purchasers under the decree would be protected. This is going far enough, and all that is intended by paying respect to foreign judgments. But in relation to the assured, and assurers, who were no parties to the litigation in the court of admiralty, and who submitted, if at all, *ex necessitate*, to its jurisdiction, this court will be compelled, in order to do justice between them, to examine the grounds of their sentence. The object of the inquiry will be, not to reverse it, to which this tribunal is incompetent, nor to disturb any rights acquired under it, which would be improper, but to ascertain how far the causes *assigned were just, and if so, how the condemnation is to affect the present question. If captain *Weeks* had a right to do what he did, then this sentence is unjust, and instead of a defence, it forms another item or link in our proofs of loss. But if the sentence consist with the law of nations, still we say the underwriters are liable, because they insured us against every risk attending a voyage to a blockaded port. When the reasons of a sentence appear, a foreign court will ever re-

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view them. This is a rule so intelligible and fraught with so much plain and common sense, as to be liable to no misapprehension. It may be obscured, as often happens, but cannot be illustrated, by an anxiety to amplify and elucidate. It is not like the doctrine of a silent foreign sentence, being conclusive between parties to a policy in cases of warranty, which now also awaits its doom in this honourable court. Not a hundred volumes, not all the lawyers in the universe, can ever succeed in rendering such a position intelligible to men of common understanding. It requires a sublimation of genius, to comprehend one syllable of what is written or said on the subject. If Sir *William Scott*, in delivering this decree, had withheld his reasons, every one would have been compelled to conclude, as in the case of *Goix* and *Low*, that the *Columbia* was condemned *as enemy's property*. The judge having been more communicative than usual, we are relieved from the trouble of guessing, and the *necessity* of doing injustice, for in this case also, there was a warranty that the property was *American*, which is admitted by the decree, or the assured were inevitably gone. This court, we presume, will have no difficulty in examining the reasons assigned for this condemnation, and making up a judgment of their own on them. Suppose the *Columbia* had been condemned, although an unarmed merchantman, "as an article contraband of war," as was done with the *Calliope* by one of the *West-India* tribe; would this court hesitate to pronounce such a sentence a wicked departure from the law of nations, or to give the owner the full benefit of his insurance? In a word, the plaintiffs contend that they had a right to go to *Amsterdam*, blockaded or not. That if they had no such right, the master was not guilty of a breach of blockade. That he did only what was permitted by the law of nations, and the *British* treaty, and that therefore in every *point of view they are entitled to a reversal of the judgment of the supreme court.

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Troup, contra, insisted the judgment ought to be affirmed. 1. Because, by the universally received law of nations, the entry of a blockaded port, or even the attempt to enter it, with a knowledge of its being blockaded, is a just ground for confiscating the cargo, as well as the vessel, where they both belong to the same owner. 2. Because, it cannot be presumed to have been the intent of the parties, that the insurance in question should be made to *Amsterdam*, as a blockaded port; for if such had been their intent, it must have been accompanied at least with an implied license from the defendants in error, to the plaintiffs in error, to attempt to break the blockade, at the risk of the defendants in error, if a state of things should be found to favour the attempt; and it will be contended, that under such circumstances, the insurance was void in its commencement, as being contrary to law. 3. Because, supposing the insurance was not intended to be made to *Amsterdam*, as a blockaded port, the attempt by the master of the *Columbia* to break the blockade, in pursuance of discretionary orders given to him for the purpose, by the plaintiffs in error, who were the owners of the vessel, is not one of those acts of the master, for which the defendants in error are liable in damages to the plaintiffs in error. 4. Because, it clearly results from the facts stated in the record in this cause, that *Amsterdam* was a blockaded port; and that the master, with full notice of its being so, attempted to break the blockade. And it will be argued in behalf of the defendants in error, that such attempt of the master has discharged them from all responsibility to the plaintiffs in error.

Per Curiam. The question in this cause is, whether the sailing of the brig *Columbia* from *Cruxhaven* with a destination for *Amsterdam*, and an understanding that it was blockaded, is a breach of the blockade, and a legal cause of capture and condemnation? The question may be qualified, perhaps, with the addition of an intention to enter the *Texel*,

in the event only of the blockading squadron being blown off the coast, so as to leave the port in fact open for entrance. There is nothing in the verdict, or the assumption of facts by Sir *William Scott*, as the grounds of his determination, to warrant the conclusion of an attempt to break the blockade, any *farther than the same is supported by proof of a sailing from *Cruxhaven* for *Amsterdam*. Upon fundamental principles, on which our municipal code of criminal law is established, intention, with some very peculiar exceptions, is not made the subject of judicial animadversion. That the moral law, which arraigns intention, should be adopted in the law of nations, with a greater latitude than in our municipal system, is a subject of some surprise, especially when the application is for the benefit of belligerents, and to the prejudice of neutrals. In intention, there is nothing certain and permanent; it is controlled by every reflection; is changed, dropped, and renewed, by the occurrences of every hour; by the constant vicissitudes to which the agent is subject; the enterprise, on a nearer view, appals; the *locus penitentiæ* is embraced. If there is an inception of the undertaking, by advances towards the theatre of action, (as the sailing from *Cruxhaven* in this instance,) how wide a space yet intervenes! to the dominion of how many various causes is the intention subject, before the act could be completed! the information of every hour may change the destination; the receipt of counter-instructions from the owner may arrest further progress; the perils of the sea overwhelm; the information received at *Cruxhaven* that induced the sailing, may be contradicted; and, lastly, before the vessel may arrive on the line of investment, the blockade may be, by instructions from the admiralty, withdrawn, or raised. The rule that the sailing with a destination for a blockaded port, is a breach of blockade, as urged upon the court, is undefinable in relation to distance between the port of departure and that of destination, and will produce great uncertainty and vexation. Nothing is to be found in the verdict or facts

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stated, or assumed in the sentence of the admiralty, from which to infer the progress of the brig from *Cruxhaven* to the *Texel;* Sir *William Scott* meets her at the threshold, at the port of departure, and pronounces the sailing with an intention of evading the blockade, to constitute the offence: these are his words. It is fairly presumable, that the ground thus taken by the judge, corresponded with the proof, was as broad as the evidence would justify. The record in the cause presents no fact to warrant a contrary conclusion. No inference is to be made from the plaintiffs' communication by letter of the 27th *June*, that the defend-

* xxv ants *consented to an attempt to enter a blockaded port, as that letter closes with the observation, that the blockade might probably be withdrawn before the arrival of the vessel. Therefore quite the contrary is rather to be supposed. It is unnecessary to give an opinion on the case of an actual attempt to enter a port during the interruption of the blockade, by reason of the blockading squadron being blown off; as, in this case, no such attempt was made, nor is the fleet found to have been so blown off. It is therefore the opinion of the court, that there is no authority of precedent binding on it, to warrant the rule adopted by the admiralty sentence in this cause; that such rule is opposed to essential principles, uncertain in its application, and highly vexatious to neutrals; that the principle of the late treaty between *England* and *Russia* is more propitious to the interests of commerce, and sufficiently favourable to the rights of belligerents, and merits high respect from all neutral powers. Therefore the judgment below must be reversed.

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Philip Urbin Duguet *against* Frederick Rhinelander and others.

IN error from the supreme court. The plaintiff (who was also plaintiff below) declared on a policy of insurance, in which both vessel and cargo were warranted "*American property.*" The plaintiff was a *Frenchman* by birth, who emigrated to this country *flagrante bello*, and was naturalized in 1796. His ship, and that part of her lading which belonged to him, were condemned by the Judge of the vice-admiralty at *Nassau* in *New-Providence*, because the plaintiff "was, at the commencement of hostilities, and still is, a citizen or subject of the *French Republic.*" A special verdict having been found, it was referred to the court to determine whether the plaintiff was entitled to recover as for a total loss, or only for a return of premium, or whether the verdict should be entered for the defendants. Judgment having been given for a return of premium, the case was brought up, on the same points which were made below. 1st. Whether the warranty of neutrality was complied with? 2d. Whether there was not an undue concealment in not disclosing the period of naturalization, that the underwriters might have calculated against *the risk of confiscation, for the reason assigned by the sentence promulged? * xxvi

If a belligerent emigrate to a neutral country *flagrante bello*, and be there naturalized, a warranty of neutrality is supported by such naturalization, nor need he disclose to the underwriter the period of his emigration.

Per Curiam. The first question arising for the consideration of the court, in this cause, is, *whether the plaintiff has verified his warranty of American property in the goods insured?* The determination of this point involves the important question, whether the plaintiff is to be deemed, *for the purposes of commerce*, an *American citizen.* On this question, while the claims of a state upon its citizens, when surrounded and pressed by its enemies, are recognised; while the course to which duty prompts is plain, and readily perceived; yet so different are the circumstances of dif-

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ferent states, so various their policy, that the right of citizens to emigrate during war, must, so far as respects the parent state, depend on the particular ordinances of each individual community. What might not be inconsistent with good policy, in a state possessed of an overflowing population, and a scanty subsistence, would be quite different from that of a state with a thin population, requiring all her hands for defence, and with sufficient bread for all her citizens. Was the condition of all nations alike in this respect; was the same reason and necessity for prohibiting emigration during war common to all, the rule contended for by the defendants, would have been long since settled, as *a fundamental principle of the law of nations*, and expressed in language too unequivocal to admit of a doubt, at this period. If a state is assailed by external enemies, and requires for defence the united efforts of all its citizens, of all that it has given birth to, a prohibition against emigration, as we have witnessed in *France* by the ordinances of 1704 and 1744, will attain all that is necessary in this respect, to the safety and defence of the state. If such prohibition is not interposed, the door is open to emigration. But is an emigration, which is lawful in relation to the parent state, equally so in reference to the enemy of such state? As a general rule, it is so. At the same time, should the citizens of a belligerent power, in concert with the state, or for the purpose of multiplying the warlike resources, or aiding the enterprises of the state, emigrate to, and take a stand in a neutral country, in order to mask mercantile projects under a neutral flag, there can be no hesitation in pronouncing such emigration *fraudulent*, and that an establishment, and residence, for such unwarrantable *purposes, cannot acquire to the emigrant a neutral domicil; he still would continue a member of his native family, and as such must participate in, and be affected by the fortunes of the parent state. When such a case is brought before the court, such a determination will be had, as will preserve to the belligerent the full exercise of his

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rights over the property of its enemy. But because the right of emigration may be abused in time of war, it by no means follows, that such right does not exist; and though it may be difficult to detect and punish such abuses, the argument from thence, against the right, cannot prevail. As far as appears from the record in this cause, the emigration of the plaintiff proceeded from a common principle of action that prevails more or less in all periods, and all countries; for the subsistence of himself and his family, he removed to and acquired a *domicil* in this state. This *domicil*, upon general principles, confers for the purposes of commerce, the right of an *American* citizen. Native *Englishmen*, *domiciled* in *America*, by a decision of *Westminster-Hall*, participate in the rights of *American* citizens, in relation to trade between *America* and the *East Indies*. It will be unnecessary to consider whether the situation of the parent state was not such, at the period of the plaintiff's emigration, as to have no claims upon its citizens; as rent with factions and violence, and yielding no protection. Upon the point of *undue concealment*, raised in the cause, after the foregoing opinion, it will be necessary only to add, that if the faith of contracts should be deemed to have required of the plaintiff a disclosure of his condition, *as affording a pretext for condemnation*, *undue concealment* is a fraud, odious in law, and as such, not being found by the verdict, is not to be presumed. For the foregoing reason the judgment of the supreme court ought to be corrected, and the judgment here be as for a total loss.

John R. Livingston *against* William Rogers.

Parol evidence of the contents of a letter of attorney, may be adduced, if the person to whom it was given prove it to have been lost.

IN an action on a stock contract, the plaintiff, to establish a tender of the stock, called on *Gulian M'Evers*, who swore that he, under the authority of a letter of attorney,

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made to him by the plaintiff, with whose hand-writing he was acquainted, and attested by *John Wilkes*, a notary public, *did, after due notice to the defendant, attend to transfer the stock, but the defendant never appeared. That after this, the letter of attorney was, by the witness, deposited among some papers, and had been since lost. *John Wilkes* deposed, that he never subscribed any letter of attorney as a witness, without seeing it first executed. The plaintiff then offered to go into parol evidence of the contents of the letter of attorney, but this being overruled by the judge who tried the cause, a bill of exceptions was tendered, on which the case came before the court. The defendant, in support of the judgment below, relied on the following points: 1st. That the letter of attorney, being a material link in the evidence, ought to have been shown to the court and jury, that they might determine on its certainty; and where there is a subscribing witness to an instrument, it must be established by him, if within the jurisdiction of the court, such being the agreement of the parties. 2d. That the production of deeds can be dispensed with, only where they appear to be in the possession of the opposite party, who has been duly served with a notice for their production; or where they have been lost or destroyed, not by the *laches* of the party to be benefited by them, but by fire or other accidents. 3d. That in the whole of this case, the conduct of the agent or attorney of the plaintiff, must be considered as that of the plaintiff himself, who cannot allege his own or his agent's carelessness, as a reason for the non-production of papers he was bound to preserve.

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Per Curiam. The question upon the bill of exceptions interposed in this cause, is, *whether it be competent for the plaintiff to give parol evidence of the contents of the letter of attorney to M'Evers, under the circumstances detailed in the bill of exceptions, or must the instrument itself be produced?* The ancient rule of the common law was highly rigid in

this respect. It dispensed with the production of instruments in a few select cases, and then only for peculiar and specific causes. But experience under that rule, has, in the progressive improvements of *English* jurisprudence, resulted in a relaxation of the law on the subject. The non-production of instruments is now excused, for reasons more general, and less specific, upon grounds more broad and liberal than were formerly admitted. In 3 *D.* & *E.* (151.)† a declaration on a deed *was sustained, and the *profert dispensed with*, upon the general allegation of a loss by *time and accident*. In *Beckford* v. *Jackson*, (*Esp. Rep.* 337.) the plaintiff counted on a deed *lost or mislaid;* upon which issue was taken, and the same recognised, as warranted in law, by Lord *Kenyon*, who presided at the trial. Other cases are to be found in the *English* reports, of similar import, sanctioning the same principle. Upon the authority of those cases, and the reason of the thing, we are of opinion, that parol evidence of the contents of the letter of attorney to Mr. *M'Evers*, ought to have been received, and that therefore error has intervened in this respect. Upon the admission of such testimony, should the trial disclose evidence, or reasonable grounds of suspicion of a suppression of the instrument, of *mala fides* in the plaintiff, or should the evidence of its existence and legal efficacy not be clear and satisfactory, it will become the duty of the court to direct and charge the jury for the defendant; a *venire facias de novo* must therefore be awarded.

†*Read* v. *Brookman.*

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James Johnston and Robert Weir *against* Daniel Ludlow.

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The trade of a domiciled alien, carried on from the *United States* with the enemies of his mother country, is protected under the warranty against illicit trade. To constitute a breach of that warranty, the seizure must be for an actual illicit, prohibited, or contraband trade; a seizure and condemnation, under pretext of such a trade is not sufficient, if the trade be not in fact one or the other. A sentence in a foreign court of admiralty is not even *prima facie* evidence of any fact, if there appear in it enough to rebut such a presumption.

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ERROR from a judgment of the supreme court, in an action on a policy of insurance on goods from *New-York* to *La Vera Cruz*. The instrument contained the following clause: "That the property be warranted, by the assured, free from any charge, damage, or loss, which may arise in consequence of a seizure or detention of the goods hereby insured, for, or on account of any illicit or prohibited trade, or any trade in articles contraband of war." From the special verdict it appeared that the plaintiffs, who were the same in both courts, had shipped, besides the property insured, six blocks of tin, and seventy-eight boxes of tin plates. That the latter were condemned as contraband, and the goods insured, as belonging to the same owners, *British* subjects, trading with an enemy to their mother country; but that the defendant knew, at the time of subscribing the policy, the plaintiffs were subjects of the crown of *Great-Britain*, and that the tin was on board. Judgment having been pronounced in favour of the defendant, the case was brought before this court, and *the following questions made: 1st. Was the trade, in relation to the characters of the plaintiffs, illicit? 2d. Was the articles of tin in blocks and plates contraband of war? 3d. Did the warranty of the assured extend in judgment of law to a loss by seizure or detention, merely because illicit or probihited trade, or trade in articles contraband of war, was alleged, when in fact the trade was not such?

Per Curiam. On the first point, the domicil of the plaintiffs being established here without any fraudulent motive, but for fair purposes of commerce, this court ought not to sanction the right of *Great-Britain* to seize and confiscate their effects, as has been done in this instance. The

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case cited from *Bosanquet and Puller's Reports*, (page 430.)* which arose under the article in our late treaty with *England*, regulating our *East-India* trade, is not inapposite. In that case, the *English* court conceded to a native subject, domiciled in *America*, the right of an *American* citizen, in relation to commerce with the *Indies*. On the second point, that there may be circumstances and occasions, in which *tin*, in blocks and plates, may become contraband, is not to be controverted; but while Judge *Kelsall* professes to detail not only the causes for condemnation, but those on which he did not ground himself, he does not disclose a case which would warrant the conclusion, upon the article in question, of contraband of war. He rests himself upon the bare shipment of the article; this cannot be subscribed to, nor will the allowed effect of the admiralty sentence, as *primâ facie* evidence, avail the defendant here, as the presumption of facts, to warrant a condemnation, is repelled, by a detail of the precise grounds on which the sentence was pronounced. On the last point raised by the underwriters, that the warranty protects him against *any loss by seizure or detention, for, or on account of any illicit trade or contraband of war*, nothing in this provision is relevant to the case before the court. The clause literally extends only to partial losses, occasioned by a seizure or *temporary detention*, unfollowed by a *condemnation;* and if extended farther, it cannot have been the intention of the parties to the policy, to throw upon the assured a loss where there could be no fault in him; when no illicit trade or contraband existed in fact, merely because a pretext of that kind is set up to cloak the condemnation. The expression, "*for and on account of*," is not equivalent *or convertible into the words *under pretence of*, but may well be understood to mean *for the cause of;* implying the actual existence of either illicit trade or contraband, as producing such loss or damage. No other construction ought to be admitted, unless the language of the contract is plain and unequivocal, necessarily inducing a

* *Morgan* v. *Wilson.*

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contrary interpretation. The facts in the cause do not, as the law is now settled in *Great Britain*, bear out the conclusion of the vice-admiralty court; nor can any thing in the warranty of the assured protect the underwriter. The judgment of the court below must be reversed.

CASES

ARGUED AND DETERMINED

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

CORRECTION OF ERRORS

IN THE

STATE OF NEW-YORK:

FEBRUARY TERM, 1804.

Teunis Bergen and Michael Bergen, Appellants, and Wilhelmus Bennett, Respondent.

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A power to sell contained in a mortgage deed, on default of payment, is a power coupled with an interest, and does not die with the mortgagor. If such power be recorded in the book for recording mortgages, it is a compliance with the act. A sale under such power is a species of foreclosure, and under it a mortgagee may himself make a *bona fide* purchase. After a lapse of sixteen years from the time of such sale, known to the mortgagor or his heir, who during that period, has remained passive, a redemption will not be allowed.

THIS was an appeal from the decision of his honour the chancellor, permitting the respondent to redeem. The facts as they appeared from the bill, answer and testimony, were these: on the 12th of *April*, 1776, *Wilhelmus Bennett*, deceased, executed to *John Vanderbilt*, a bond for 600*l.* payable in one year, with interest at 5 *per cent.* and, for further security, he also gave a mortgage on 67 acres of land, situated at a place called *Gowanes*. Shortly after this, on the 8th of *November*, 1776, the mortgagor died intestate, leaving the respondent *Wilhelmus*, then a minor of fifteen years of age, his eldest son and heir at law. The usual

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power to sell was contained in the mortgage, which, *together with the power*, was, on the 10th of *April*, 1777, registered in the office of the clerk of the county, *in the book for registering mortgages*. In the registry the mortgage was, as usual, abbreviated; but the power was, though *not recorded as deeds usually are*, set forth in the registry of the mortgage, *in hæc verba*, excepting as to *the latter part, declaring the sale to be a perpetual bar, &c. which was totally omitted. On the 13th of *April*, 1781, the appellant, *Teunis Bergen*, purchased the bond and mortgage for a *bona fide* consideration of 700*l*. In 1783, the respondent left this state and went to *Nova-Scotia*. On the 11th of *March*, 1804, the appellant *Teunis* commenced the publication of a notice of the sale of the premises, under the power contained in the mortgage. The notice did not specify the boundaries of the land mortgaged. It began on the 11th of *March*, 1784, by an advertisement in a weekly paper, and was, after the first week, regularly continued in the supplement, which was the usual mode observed by the printer. The publication of the notice appeared, from a file of the papers, to have been duly made, except as to the three last days; but for those days the paper or supplement was missing. A copy also of this advertisement was, six months previous to the sale, fixed up on the outward door of the court-house of the county in which the lands lay; and there remained until after the sale, on the 11th of *September* following. At this, one *Christopher Bennett*, a schoolmaster in the neighbourhood, officiated as auctioneer, in consequence of a request from the appellant *Teunis Bergen*. The conditions exhibited at the time of sale were as follows: "*Brooklyn Township*. Articles of the vendue for the sale of the land and meadow land, belonging to the estate of *Wilhelmus Bennett*, deceased, containing 60 acres, more or less, held this 11th day of *September*, 1784, by *Teunis Bergen*. Art. 1. That the highest bidder is to have the lot or parcel of land when struck off to him. 2. That the *Indian* corn and all the planting produce thereon is to be excepted. 3. That a

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drain of ten feet wide for the *Collick* be excepted. 4. That 100 rails of the cross fence of the corn be excepted. 5. That the money bid for the land is to be paid at the execution and delivery of the writings. 6. That in case the person or persons, to whom it is struck off as aforesaid, cannot produce or procure a sufficient security, then and in such case, the same lot or parcel of land shall be put up again; and if the same is then sold for less, the first buyer shall make up the deficiency; if sold for more, the first buyer shall have no benefit by the sale." At the time of the vendue, no persons were present but the auctioneer, the appellants, one *Cowenhoven*, and a tenant who lived on the land.

* There was but one bid, which was by the appellant, *Michael Bergen*, for 700*l.* and, after having waited two hours, to see if any person would come and offer more, it was struck off at that sum to him; and he, having attended to purchase on behalf of the other appellant *Teunis*, after a conveyance duly executed to him, reconveyed to *Teunis*.

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It appeared that the premises were not, at the time of sale, worth more than the principal and interest due; one *Cowenhoven*, to whom the land was offered, and who was a creditor of the mortgagor, having declared he would not give the amount of the bid. In 1788 the respondent came back to this state, and on the 3d of *February*, 1800, filed his bill. The respondent in support of the decree, alleged in his case, that the sale could not bar the redemption for which he prayed, as it was null and void, on the following grounds: 1st. Because the power to sell, contained in the mortgage,* "*was not recorded as deeds*† *usually are*," before the execution of the conveyance to the purchaser. 2d. Because the notice of the sale was uncertain, and that the directions of the statute were not complied with in the publication of it. 3d. Because the conduct of the appellant *Teunis Bergen*, touching the sale, and the proceedings preparatory thereto, were actually fraudulent. 4th. Because the power to sell, contained in the mortgage, expired with the life of the donor. 5th. That the mortgagee was a trustee

* *Rev. Laws*, 482. s. 6.
† See the act relating to recording deeds. *Ibid.* 478.

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for the mortgagor, and as such, could not be a purchaser of the property, which he himself sold in that capacity.

CHANCELLOR. Mr. President—The complainant has filed his bill for a redemption; to which the defendant answered, and a number of depositions have been taken, disclosing the circumstances stated in the case. On these, several questions have arisen, which have been very fully discussed by the counsel for the parties; but all of which, the first excepted, relating to the manner in which the power has been executed, must necessarily depend upon its validity at the time of such execution. The first of these questions, then, in the natural order in which they present, is, whether the power contained in the mortgage, expires with the life of the mortgagor? In the *English* code, no principles are to be discovered, which have been applied in their courts to bar an equity of redemption, *by the mere act of the mortgagee*, without the aid of judicial intervention.

* 4 This *device appears of native growth, originating from the circumstances of this country, and, probably, principally from the disparity between the actual product, and estimated value of real estates. This may have rendered necessary a more summary and less expensive mode of barring the equity of redemption, than that which obtained through the medium of chancery, a desirable object. It seems that previous to the year 1775, it had been a practice to introduce into mortgages, clauses authorizing a sale by mortgagees, and that many estates were then held under such sales. A statute was passed, reciting this circumstance, and declaring that *no good* and *bona fide* sales of mortgages, lands, tenements, or hereditaments, made or to be made by mortgagees or others, authorized thereunto by special power for that purpose in due form of law, from him or them who had the equity of redemption, shall be defeated to the prejudice of the *bona fide* purchasers thereof, in favour of, or for the advantage of any person or persons claiming a right of redemption in equity. To this was added a proviso,

1775. *L. N. Y.* 480.

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that this should not prejudice prior *liens by mortgages executed before such sale*, judgments, or decrees in equity. This statute saved the interest of mortgagees deriving title under mortgages executed before such sale, and all creditors, "to whom the mortgaged premises, or any part thereof, was *before* bound by any judgment at law or decree in equity." It appears to have been intended as a declaratory act, and if so, the proviso seems to contain a legislative declaration, that the power to sell did not irrevocably rest, *as a right* in the mortgagee; for, if it did, the after acts of the mortgagor, or the judgments and decrees rendered against him, subsequent to the execution of the power, could not detract from the right of the *mortgagee, empowered to sell;* that it was intended they should, is to be collected from the consideration that the word *before*, in the latter clause, must clearly relate to the sale, and not to a period anterior to the execution of the power. But it may be taken in that sense, or as intended for greater caution, and as leaving the power to be construed as respects the cases excepted, without being affected by the statute. In either case, it cannot be considered as affecting the question in aid of the power. The powers treated of by *Powell*, in his admirable treatise on that subject, were, as he states, originally mere modifications of uses, whatever was equitable in which, the statute *of 27 *H.* VIII. transferred to law: thus he distinguishes powers in relation to donees, and collateral powers, as simply relating to *uses and trusts*, and the enabling and restraining powers, as mere branches from the same generic trunk. I take it therefore that the doctrine deduced from *Powell*, as directly applying to the present subject, cannot be considered as correct, and that the principles by which it is to be tested, are to be sought for elsewhere. If the power in question was a *naked authority*, substituting the mortgagee or his representatives to represent the person of the mortgagor, it is conceded it must expire with the life of the person creating it. But it is insisted, an inseparable connexion exists between the power and its object, *the estate;* that

Powell on Powers, 4.

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Co. Litt. 52. 2 *Roll. Abr.* 9. cited 1 *Bacon*, 204.

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the duration of the former must of necessity be commensurate with that of the interest in the latter, and that it can only be exhausted by its actual execution; or that the power is in the nature of a covenant, running with the mortgaged premises. These positions I shall consider separately. As to the first: If a second mortgage was executed, intermediate the execution of the power, and the sale under it; the second mortgagee is supposed to acquire an equitable *lien*, for the satisfaction of his security, on the mortgaged premises, if the fund mortgaged is more than adequate to the discharge of the first. An equity of redemption is considered as a subject to which a *lien* arising from a judgment, or decree, may attach. In neither case, can the subsequent encumbrances be considered as united in interest with the first. On the contrary, their relative situations show there must always be a collision, and frequently a direct opposition of interest. On the footing of a revocation of an authority, their situations are compatible with the practice which has prevailed on the subject; but if the power is considered as an absolute vested right, the subsequent mortgages, judgments, and decrees, must be effectually overreached by the sale, which must undoubtedly, on that ground, relate to the period when the right was acquired. The situation of the mortgagor and mortgagee at law, *if the authority is to be tested by strict legal principles*, operates against considering the power as an interest combined with the estate granted; for, to all legal purposes, the fee, upon the execution of the mortgage, vested in the mortgagee, subject to the usual defeasance. At law, therefore, the title acquired by the purchase under the power, could only be cumulative; and if so, *the revesting the estate, depending upon the contingency of payment in compliance with the condition, the interest of the mortgagee would be destroyed by such payment, and in either case the power must be rendered inoperative. If such is the situation of the parties at law, what reason can there be for an equitable interposition? The principles that this court pursues and cherishes will

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prevent it from relaxing the rules of law, unless it be for the purpose of promoting substantial justice. The intent of the parties has always been permitted to have a powerful effect in the construction of deeds: but though the intent in this case to delegate to the mortgagee, *his executors, administrators, and assigns*, a power to make a sale, is clearly to be inferred, it does not afford as satisfactory an inference *that the representatives of the mortgagor were intended* to be equally bound with himself, to continue that power; and if not, there is no equitable principle on which the power can be extended beyond its mere legal operation. I have not been able to discover, that the doctrine contended for, *that the power is to have equal duration with the estate*, has been recognised in any instance of this kind. Nor do I know a case, analogous to this, in the books; and from the industry and ability of the counsel who argued this cause, as well as my own fruitless researches, I think I may venture to say that none exists. Wherever it rests in the discretion of the court, to give a more liberal or restrained construction to the acts of parties, it is consistent with the principles which regulate the conduct of this court, to examine the tendency of the several constructions which they will admit, and to mingle the inconveniences of adopting one or the other of those presented, as an ingredient to preponderate the scale, otherwise equally poised. By giving these powers a duration beyond the life of the mortgagor, they may in many instances disinherit his heirs; for here the *parol* cannot be permitted to demur; here is no saving of the rights of an infant, till his full age. The sale, if admissible at all, must be absolutely conclusive. By considering the right of sale as blended with, and coextensive in its duration with the estate, subsequent encumbrances, by judgments, decrees, and mortgage, must be completely at the mercy of the first mortgagee. For if this right is a vested right, assimilating to that of property, every sale under it must have a retrospective effect, and completely destroy all encumbrances, intermediate to its acquisition, *and the sale

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under it. These are consequences of great importance, which I think this court cannot countenance; but on the contrary ought to resist, especially as the primary object of the mortgage, *the enabling the mortgagee to hold the land mortgaged, as a pledge for the payment of the debt*, is thus defeated, to the prejudice of the mortgagor's representatives, and as devices calculated to bar the equity of redemption, which, as susceptible of being wrested to oppressive purposes, ought to be leaned against as inconsistent with the original intent. Though this, I believe, is unexplored ground, I have very little hesitation in saying, that from my view of the subject, the doctrine of irrevocability cannot be sanctioned. As to the second position, that this power is to be taken as a covenant running with the mortgaged premises, there are no words of covenant. It imports to be a new grant of a power; it is a device intended to foreclose the mortgagor, without the intervention of judicial examination; and, if a covenant, it must become a subject of such examination, before it can have complete effect. If, as this clause is contained in an indenture, it is to be considered as the words of both parties, it might perhaps be construed a covenant *at law*, but that would not better the situation of the defendant; for the mortgage vests the estate in the mortgagee, and his heirs; the power is to him, his *executors, administrators and assigns*. This, if a covenant, could not run with the land; for to effect this, there ought to be a privity of estate between the representatives on whom the power and the estate would devolve upon the death of the original parties; here the heirs of the mortgagee, by the limitation of the estate, would take it, but the right derived from the power would pass to the executor; and thus the instant the mortgagee died, the connexion between the estate and the persons authorized to execute the power, would dissolve. A stronger reason for not suffering it to conclude the heirs, is, that the defendant's title originated in a mere personal charge, and the same reasons which have already been given against a liberal extension of a power,

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would operate as forcibly not to extend the covenant by implication. If, however, it was to be considered as a covenant, binding on the heir at law, I should not be disposed to exert the powers of this court, to aid in concluding the mortgagor's representatives, as the estate is still in the hands of the representative of the mortgagee, by *giving efficacy to the covenant here. It would be contrary to what I conceive to be the established principles in this court, which are to endeavour as much as possible to compel the parties to adhere to the true spirit and meaning of their original contract in cases of mortgages, *the security of the sum advanced to the mortgagor*. Some other points, involving considerations of great interest, and extent, as to the doctrine of mortgages, were subjects of discussion on the arguments of this cause, but thinking, as I do, *that the power contained in the mortgage would not warrant the sale*, it would be useless to travel through these points, which merely relate to the mode of its execution. Upon the whole, I am of opinion, that the complainant ought to be permitted to redeem; that it ought to be referred to a master to state an account between the parties, of the amount of the principal and interest due on the mortgage, the clear annual value of the mortgaged premises, and the nature of the improvements made by the defendant.

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Bogert, for the appellants. The respondent has lain by twelve years with the property under his eyes. In that time he never makes any application to redeem. He is silent till the premises are improved at an enormous expense, and have risen greatly in value. This is like waiting for a rise in stock, after forfeiture of the mortgage. 2 *Atk.* 303.* The lapse of such a period, as in the present case has taken place, is, we contend, when a person is on the spot, an acquiescence in what has been done. If not *that*, at least a *laches*, against which this court will never relieve. It is not necessary at this distance of time to prove continuance of the notice on the court-house door, and every minute exactitude

* *Lockwood* v. *Ewer*. But had no interest been paid or demanded, the very time elapsed would, in the case alluded to, have been a bar. On a mortgage of stock, a foreclosure is not necessary. See *King* v. *Dupine*, *n.* (2). 2 *Atk.* 603.

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of publication. It is enough to show it generally, or even once, as under the absconding debtors' act. The only intermission in advertising is of three days, and for those the papers are wanting. But, without them, the six months are complete; for, in legal acceptation, unless when otherwise expressed, a month in a statute means according to lunar, and not calendar computation. 1 *Com. Dig.* 503. (B.) 1 *Black. Rep.* 450.† 6 *D.* & *E.* 224.‡ It is sufficient in any notice of the kind in question, to state the quantity of the land, the owner's name, the township and county, and the encumbrance under which sold. A specification of boundaries would not, to the community at large, render it more precise. The power is not a distinct deed, but part of a mortgage, *and must therefore be registered or recorded as that is. I use the words as *synonymes*, because we find in *Varick's* edit. p. 3. of *Appendix*, they are used as synonymous. Besides, the object of the act is directed to third persons; it was framed for the benefit of purchasers, and not of the mortgagor, except as to that part of the clause which confines to persons of twenty-five years of age and upwards, the right of giving such powers. The provision of having the power recorded, before execution of the conveyance, shows it is meant only as evidence of title in the purchaser, to establish his irredeemable right in the land. The *English* authorities demonstrate, that with them, register acts are only for the benefit of buyers to give notice of charges. The preamble of our act establishes a similar intention in our legislature. Therefore this, like all other statutes, is to be construed only with a view to suppress the mischief, and advance the remedy. The sum due on the mortgage at the time of sale, was 924*l.* the refusal of *Cowenhoven* to take it at 700*l.* does away all charge of fraud; nor does the non-attendance of persons at the vendue, afford room to infer the existence of any; the very amount of the encumbrance might keep them away, this being apparent in the notice. As to the power, *that* could never die with the donor. He could not have revoked it in his life. It is an

† *Talbot* v. *Linfield.*

‡ *Lacon* v. *Hooper.* 1 *Esp. Rep.* 246. *S. C.* But if it relate purely to mercantile transactions, the term then means a calendar and not a lunar month. Therefore, in charter-parties it has the calendar acceptation. *Jolly* v. *Young*, 1 *Esp. Rep.* 186. And on a decree to foreclose at a certain period, the computation is by calendar and not by lunar months. *Barn.* 324. 2 *Eq. Ca. Abr.* 605. *pl.* 38.

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nexed to the security. In the common case of a power, accompanying an assignment of debts in satisfaction of a demand, it is irrevocable;* and that which cannot be revoked, survives. It is plainly a power coupled with an interest, and therefore runs with that interest. 3 *Atk.* 714.† 1 *Vez.* 306. *S. C.* 1 *Bac. Abr.* 321. 2 *P. Wms.* 120.‡ The injury which it is apprehended the heir might sustain, can have no weight; for, as the ancestor might at once have sold absolutely, so he may order it to be done at a future day. He had complete dominion over it, and had a right to bar any, or all of his posterity. By the words of his contract, he has agreed to do this, on the happening of certain events. That the mortgagee is trustee for the mortgagor, is only true *sub modo*, as to the surplus. But allowing it to be so, there is no positive rule against a trustee's purchasing the subject matter of his trust. Whether the purchase will be valid or not, will depend on circumstances. 5 *Vez.* jun. 678.§ The rule, however, can never apply where the trustee stands in the relation of *cestui que trust* also. In this situation a mortgagee *must be viewed, as he is interested to the amount of his mortgage, and bound to take care the estate is not sold under the amount due upon it. This distinction was taken in the cases of *Alaire* v. *Munro*, and *Le Roy* v. *Vreeder et al.* Besides, the sale is under a statutory provision, meant to have the effect of a foreclosure. This, therefore, is in some degree a purchase under a judicial proceeding, and had it been before a master in chancery, by virtue of an order of court, there could be no doubt on the subject. The present mode was intended by the act, to be in lieu of a bill to foreclose; it is therefore attended with the same consequences. The redemption then ought to have been sought within five years. *Lockwood* v. *Ewer*, 2 *Atk.* 303. A purchase by executors of a mortgagee, through the intervention of a person who acted as trustee for them, was not impeached. *Tooke* v. *Hartley*, 2 *Bro. C. R.* 126.

* *Walsh* v. *Whitcomb*, 2 *Esp. Rep.* 565. *S. P.*
† *Hearle* v. *Greenbank.*
‡ *Eyre* v. *Countess of Shaftsbury.*
§ *Campbell* v. *Walker.*

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Hamilton and *Tompkins*, contra. The power in the mortgage has been registered in the customary manner adopted as to mortgages themselves. The act is specific that they shall be recorded previous to the execution of the conveyance, "*as deeds usually are.*" We all know this is in a book kept for the purpose, and *in hæc verba.* This too has been the practice, and *communis error facit jus.* It is a cotemporaneous exposition of the law. The intent of the legislature we cannot inquire into; we see what they have ordered. It would seem that the legislature contemplated some mode distinct from that prescribed for mortgages. It is an essential prerequisite to the execution of the conveyance, and not to be dispensed with. The proceedings under the power being in lieu of a bill to foreclose, it is necessary strictly to adhere to every form, however minute. Every compliance must be made to appear. The deficiency of proof in establishing the notices required by the act, renders the sale absolutely void; and, as the notice on the court-house door was cut from a newspaper, allowing the publication in the paper to have been for six months, the notice on the door could not have been affixed for that period. Besides, it was in a supplement; and a supplement to a paper is not the paper itself. This exactitude is indispensable, because the law operates against a peculiar favourite of chancery. A favourite so great, that any clause, restraining the right of redemption, will ever be set aside, as repugnant to the original object of the parties, and contrary to the nature of a mortgage, *which in equity is regarded merely as a security for money lent.† If therefore it be in a deed, it is viewed as the result of an undue influence over the mortgagor, arising from the power which a lender naturally has over the person borrowing. On this account no limitation of time, short of twenty years, can prevent the exercise of this right, which is thus circumscribed, in analogy to ejectments at law, to preserve a uniformity of practice in all that relates to land. The foreclosure having taken place, is immaterial, if the property, at

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† *Jason* v. *Eyres*, 2 *Ch. Ca.* 33. *Howard* v. *Harris*, 1 *Vern.* 33. 190. *Kilvington* v. *Gardiner*, cited in *Howard* v. *Harris*. *Willet* v. *Winnel*, 1 *Vern.* 488.

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the time of filing the bill to redeem, be worth more than the principal and interest due. A boundary is as necessary a description of an estate as a county or town; and the articles of sale vary the quantity from that mortgaged. These and the reservations of the corn, &c. tended to lessen the value of the premises. They form one of many badges of fraud, apparent from the conditions of vendue, and the appointment of a schoolmaster as auctioneer. The mortgagee is a trustee, and emphatically so for the mortgagor. It is a settled principle that a trustee cannot purchase the object of his trust. 2 *Eq. Ca. Abr.* 741. *Holt* v. *Holt.** 1 *Ch. Ca.* 190. *Whaley* v. *Whaley*,† 1 *Vern.* 484. *Whitacre* v. *Whitacre*, *Cas. temp. King*, 15. 61. *Whelpdale* v. *Cookson*, 1 *Vez.* 9. *Crowe* v. *Dallard*, 1 *Vez.* jun. 215. *Campbell* v. *Walker*, 5 *Vez.* jun. 678 to 682. *Ibid. ex parte Reynolds*, 707, 708. This last case, which also refers to *ex parte Hughes* and *ex parte Dumbell*, 6 *Vez.* jun. was this: An assignee under a commission of bankruptcy, purchased the estates of the bankrupt at auction; they were ordered to be resold, from this general principle, that an assignee could not be a purchaser. Here the characters of trustee and *cestui que trust* were united, yet held that no purchase could be made, the permission of a court of chancery being necessary to sanction the transaction. In the case now before the court no purchase could be valid, because the power under which the sale was made, had determined by the death of the grantor. *Co. Litt.* s. 66. "If a man maketh a deed of feoffment to another, and a letter of attorney to one to deliver to him *seisin* by force of the same deed, yet if livery of *seisin* be not executed in the life of him which made the deed, this availeth nothing." The power was there collateral to the land, and so here; for it goes to the executors of the mortgagee, while the land would descend to *his heirs.‡ It was therefore a mere legal authority, between which and a power there is a technical distinction. These latter took

* The only point in that case relating to trust is, that if a trustee of a term surrender and take a further term, it shall be for the benefit of the *cestui que trust.*

† An executor, trustee, renewed a lease in his own name, and after mortgaging it, assigned the equity of redemption to a trustee to pay his own debts. The trustee sold to a purchaser with notice of the original trust, the purchase set aside.

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‡ But the heirs of the mortgagee would be merely trustees for his executors, *Ellis* v. *Guavas*, 2 *Ch. Ca.* 50. *Tabor* v. *Grover*, 2 *Vern.* 367. *Wood et al.* cited 2 *Vern.* 198. *Turner* v. *Crane*, 1 *Vern.* 170.

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their rise from, and were created by the statute of uses. Allowing, however, that the power did survive, it ought to have been strictly pursued, and every exception in the articles exhibited at the time of the auction, was, if not a fraud, at least a violation. None of the cases cited touch the present; *Lockwood* v. *Ewer* was a case of a mortgage of stock. The determination was, that on such an interest there was no equity of redemption. In the other case cited, there had been a lapse of thirty years after foreclosure. *Tooke* v. *Hartley* was a case of a lease for years, and there the foreclosure had destroyed all privity between the parties.

Troup and *Benson*, in reply. A principal question is, have the statutory provisions regarding the sale under the mortgage been complied with? All acts *in pari materiâ*, are to receive a similar construction. The laws of 1774 and of 1753, are *in pari materiâ*. In that of 1753, the words registering and recording are used as synonymous; therefore in that of 1774 they must be considered as *synonymes*. The act is silent as to the book where these powers are to be recorded, and as the provision must be for the information of persons wishing to purchase, convenience requires it should be in that book where the mortgages are registered. The cotemporaneous exposition, and the *communis error* relied on, are in favour of this position; for by a certificate from the clerk of the county in which the mortgaged premises lie, but one instance is found of the mode contended for by the respondents; whereas, twenty and upwards occur of that for which we insist. The advertising the notice for six months is well proved, though the papers in which it appeared are missing; for when written evidence is lost, the resort is always to parol. The exceptions were all in favour of the mortgagor, for what was excepted now remains; and as to the corn, &c. the lands were in the hands of a tenant, who, though his tenancy was at will, could not be deprived of his emblements, on the landlord's determining the tenure. The main question, however, for all the others

are but of minor importance, is, whether the power to sell contained in the mortgage, was revoked by the death of the mortgagor? The rule is, that a naked authority is revoked by the death of the donor; but *an authority coupled with an interest, survives to the donee. A naked authority is one granted without consideration, vesting no interest in the donee, and to be exercised for the benefit of the donor. This is the kind liable to be revoked by him, and expiring on his decease. The authority in this case is of a different kind. It is founded on a valuable consideration paid, vests an interest in the mortgagee, and for his benefit it is to be exercised. This is the species which cannot be revoked. A mortgage gives a conditional estate in fee-simple. To render it absolute, it was necessary to recur to chancery. This being attended with expense and delay, was thought a grievance, and to redress it, the power of sale came to be inserted. It is, therefore, nothing more than the grant of a special action to compel payment of the money, and this for a valuable consideration. If a special action or remedy be given, it carries to the donee an interest to effect the object of the grant, which was *here*, to raise the money due to him in a summary way. It becomes, therefore, a part of the original contract, and is parcel of the security itself. As such, it cannot be revoked by the donor. If it could, he would be able to act against, and defeat his own grant. From this he surely ought, by his own deed, to be estopped. As it is purchased for a valuable consideration, it must survive; for no grant of an interest to a grantee can cease to operate by the death of the grantor. The mortgage works as a conditional conveyance in fee-simple. The office of the power is to change the estate into an absolute fee. Where an estate is created with a power to enlarge that estate, can it be viewed in any other light than as a part of that estate? It is coexisting and commensurate with the estate; necessarily, therefore, an authority coupled with an interest, which of course survives. In the position cited from *Co. Litt.* the letter of attorney was to a third

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person, without consideration: here it is to the mortgagee himself, purchased and paid for by him. Besides, the power to give livery must, like a warrant of attorney to confess judgment, be executed in the name of the grantor; which, after he is dead, cannot be done. This is not the case with the power in a mortgage; for the legal estate being in the mortgagee, the conveyance is in his name. The reason why it is to him and his executors, is because the mortgaged premises are considered as personal estate.

* 14 The *English* *jurisprudence furnishes nothing analogous to these powers. But even under their system it has lately been the practice to convey the mortgaged premises to trustees, in trust, after forfeiture to sell for payment of the mortgage money. The principle with them is the same as with us, to save the expense of a chancery suit.† Our statute must be so interpreted as to render the sale it authorizes effectual. If the mortgagee has not the right to fairly purchase, it would be defeated. It is often for the interest of the mortgagor that the mortgagee should buy. Should only one half the money due be offered, and he be restrained from bidding, the person of the mortgagor, if alive, would be liable; if dead and insolvent, must the mortgagee stand by and lose his money? To impeach a purchase by a trustee, fraud, or making a profit, must be shown. 3 *Vez.* jun. 749. the chancellor, speaking of this rule against permitting trustees to purchase, says, "I do not recollect any case where the mere abstract rule came distinctly to be tried, abstracted from the consideration of advantage made by the purchaser. It would be difficult for such a case to occur; for, unless advantage is made, the act of purchasing will never be questioned. The rule is laid down not very correctly in most of the cases where you find it. It is stated as a proposition, that a trustee cannot buy of a *cestui que trust*. Certainly that naked proposition is not correctly true." The full value was given here, as appears from the testimony. The reason why redemptions of mortgaged premises are so much favoured in *England*,

† But note that in *England* the power of selling irredeemably without the intervention of a court of equity, is doubted. See 1 *Pow. on Mort.* 14.

does not apply to this country. Their lands are under rent, and produce an annual value. Ours afford no advantage, but from the enjoyment of the property itself. It is, therefore, a matter of easy calculation, to know when an estate can redeem itself, and whether worth more than the sum due. To discharge land from a mortgage, we have no mode but by a sale of the land itself. This is contemplated by the parties at the time of their original contract, and was the cause of introducing the power now in question. The case cited from 5 *Vez.* jun. is not applicable to the present. An assignee under a commission is not a trustee for himself only, but for others also: when he purchases, he therefore will not be permitted to exclude the other *cestuis que trust* from the benefits which they may have a right to. They say, "as you purchased to save yourself, you must do it for us too." But had the purchase *been on behalf * 15
of all the creditors, it could not have been disturbed; for the bankrupt, it is to be remarked, was not the party who complained. A strong argument against the decree, is the impossibility of going into an account of the labour, improvements, and expenses of the mortgagee.

Per Curiam, delivered by KENT, J. This case comes before the court on an appeal from a decree of the court of chancery, that the respondent be permitted to redeem. The reason assigned for the decree was, that the power to sell expired with the life of the mortgagor. This doctrine, if sound, renders it unnecessary to discuss any of the other points. If the power was extinct, the sale was null, and the right of the respondent to redeem exists in full force. It is proper therefore to turn our first attention to this point; and, although my examination of it has led me to a different conclusion, I have made it with the deference and respect due to the court which pronounced the decree. It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my

Co. Litt. 52. b. 1 *Sid.* 6.

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opinion, the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is, when, to a mere stranger, authority is given of disposing of an interest, in which he had not before, nor hath, by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. These last powers are subdivided into powers annexed to the estate, and powers in gross. Both are considered as powers with an interest, because the trustee of the power has an interest in the estate, as well as in the exercise of the power. If, as one of the old cases expresses it, the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savours of the land. The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, nor ever had, any estate whatsoever. I might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority; *but I think the point is susceptible of more precise and definite illustration. If a man, by his will, directs his executors to sell his land, this is but a bare authority without interest; for the land, in the mean time, descends to the heir at law, who, until the sale, would at common law be entitled to the profits, and, being but a naked authority, if one executor dies, the power at common law would not survive.† But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest; for the executors, in the mean time, take possession of the land and of the profits. In this case, as the estate, so also the trust, would survive to the surviving executor. There is a very striking analogy

Vide Powell on Powers, 8 10. 12. *Butler's* note, 298. to *lib.* 3. of *Co. Litt. Hale, Ch. Baron. Hard.* 415.

Hardres, 415.

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Co. Litt. 113. a. 181. b. 236. a. 3 *Salk.* 277. *Pow. on Devises*, 291 to 310.

† See the note (2) of Mr. *Hargrave* on this point, in *Co. Litt.* 113. a.

between this case, of a devise of land to executors to be sold, and a mortgage of lands with a power to sell. In both cases, the estate passes to the person clothed with the power, and in both cases the power is given in trust, to answer a specific purpose. I cannot discern any distinction between the cases, sufficient to render the power in the one instance naked, and in the other coupled with an interest. It is not a power with interest in the executors, because they may derive a personal benefit from the devise; for a trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question; and where an executor, guardian, or other trustee, is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. It has been thus frequently adjudged. This case also is still more analogous to the one of a conveyance of property by way of pledge, or in trust, with an agreement for the mortgagee to sell in case of default. This is a practice known in the *English* law, and it was taken for granted by the lord chancellor, in the case of *Tucker*, *administrator*, v. *Wilson*, that where there existed such an agreement, the mortgagee might sell after the death of the mortgagor. It seems to have been admitted, not to have been competent for the mortgagor to revoke this authority to sell, because it was granted for the benefit of the mortgagee. He might perhaps embarrass the execution of the power, by a subsequent mortgage or judgment, but the power would still remain in full force, although the land, in the hands of the purchaser under the power, might become subject to such subsequent *lien*. In short, this power is *altogether different from that of a mere naked authority: the latter is no better than a letter of attorney given to a stranger to the estate, as in the instance given by *Coke*, of a letter of attorney to make livery of seisin. This is revocable by the grantor at his pleasure in his life-time, and is absolutely re-

1 *P. Wms.* 261. 1 *Bro. Par. Ca.* 494. It was a case of absolute conveyance of stock to secure money lent. In all such cases, foreclosure is unnecessary, a sale of the stock being exactly the same thing. *Lockwood et. al.* v. *Ewer*, 2 *Atk.* 303.

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voked by his death. The grantee of such a naked power, having no interest connected with the power, has, of course, no interest affected by the revocation. The present power is in every view distinct from the other. I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the ground that was taken in the court below. I have bestowed some pains upon this question, because I am of opinion, that the grounds of a definitive decree in chancery, resting upon what is assumed to be a principle of law, ought not to be questioned and overturned without much care and consideration. It remains to see whether any of the other points, that were raised by the counsel upon the argument, will bear out the decree. It is contended, that the power was not recorded according to law. The act directs, that all powers to mortgagees, for making sales in fee, shall be acknowledged, proved, and recorded as other deeds usually are, before the conveyances for the sale be executed. I incline to think the act was complied with. The power was registered in the book of mortgages. The subject matter of the whole act is mortgages; and, in the preceding part of it, it speaks of deeds with a defeasance in a separate writing, and of conditional deeds, and declares them to be the same as mortgages. It is no violent construction, therefore, to consider the words, recorded as deeds usually are, to refer to mortgage deeds, they being the only deeds within the purview and other provisions of the act. These powers also are usually contained in the same deed with the mortgage, and to register the mortgage part of the deed in one book, and the power part in another book, would be inconvenient and idle. Admitting the proper book to have been selected, the power was well recorded; for it was recorded at length, as far as the mere power in question went, and nothing was omitted but the covenant at the foot of it, declaring the sale to be a perpetual bar. But if this be not the true construction of the act, I am satisfied that even the omission to record the power will not affect the sale. The

1 *Inst.* 52. b.

Laws of N. Y. vol. 1. *Appendix*, page 10. edit. of 1789.

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only use in recording it, is for the benefit of the purchaser, and *it does not lie with the mortgagor to object to the validity of the sale by reason of that omission. He can have no concern or interest to be affected, whether it be recorded or not. The next objection is, that the notice of the sale was not according to the directions of the act. It is alleged, that the proof of the six months' notice in the newspaper, and on the court-house door, is not, as it ought to be, full and perfect; and some nice criticisms have been made upon its deficiency. I shall forbear entering into this examination. Considering the lapse of time since the publication was made, the proof of the notice is pretty well made out, and every defect may well be supplied with a reasonable presumption. I have, however, a short decisive answer to the whole objection; and that is, that after a mortgagor or his heir has lain by for sixteen years, he shall not then be permitted to come in and question the regularity of the notice. Public convenience essentially requires that we should establish this principle. It would be too rigid and severe to exact all these *minutiæ* of proofs, after such a length of time. It was next urged, that the exceptions made and published in the conditions of sale, rendered the same void. The exceptions which have been deemed as of serious moment, (for I pass by the exception of the corn on the ground, and the 100 rails, as not requiring an answer,) are, a drain for the *collect* of ten feet wide, and certain terms imposed on the purchaser, who could not give sufficient security. I am not inclined to question the doctrine, that a mortgagee is bound to pursue his power strictly, and that, although he may sell part of the land at one time, and part at another, yet that he cannot clog and encumber the part that he sells, but must sell simply and unconditionally the whole interest, as the same was conveyed by the mortgagor. I cannot however intend, that this principle was violat d in the present case. The exception of the ten feet may, or may not, have been an encumbrance to the premises. It could not have been made, or intended as a benefit to the mortgagee,

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Co. Litt. 113. a. 1 *Co.* 173. b. *Digges'* case.

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who became the purchaser; for the premises, it appears, were not bounded upon him. He could have had no motive. For the drain being excepted from the sale, would, if created then for the first time, have remained in the heir of the mortgagor, and it must still remain his property. I think, however, we ought to intend, after this distance of time at least, that this drain had antecedently existed, and was

* 19 founded on usage, or was an exception *in the previous deeds of the land. It is more probable, then, *that* exception was put in for greater caution, and that the mortgagee himself had taken the premises subject to that exception. It would be unreasonable and impolitic, in my opinion, to disturb that sale at this day, by reason of a circumstance of such small moment, as a matter of fact, in which no fraud or gain can be imputed to the one party, or real injury to the other; and when, by fair intendment, the whole can be so easily reconciled with strict principle on the subject. The other objection is, that, by the conditions of sale, unreasonable terms were imposed on the purchasers, who could not give sufficient security. These sales at auction may be insisted on to be cash sales. The mortgagee may have his conveyance ready to execute, and may exact the money as soon as the land is struck off. If he is willing, however, to allow a credit to the purchaser, and if he be entitled to allow it, he may then, no doubt, dictate the terms and extent of the security, so as the same be not unreasonable. If the purchaser is not satisfied with these terms, he has only to advance the money which the mortgagee is entitled to demand, and if offered, bound to receive. But whether the mortgagee be entitled to sell upon credit and security, or is in all cases bound to exact the money immediately, it is unnecessary to decide; because the sale in question was not a sale upon credit, but a sale equivalent to a cash sale, since it was in reality a sale to the mortgagee himself. If he could not have sold upon security, but for cash only, these terms that were given out were null and void, and could have had no effect upon the sale, or upon the purchasers; and if he was

entitled to sell on credit and security, I should not consider the terms imposed to have been so unreasonable, as that the sale ought now be set aside, from that circumstance alone. I do not, therefore, consider these conditions of sale as forming any solid ground for the present bill, to set aside the sale and redeem. Another objection to the sale is, that the mortgagee was himself the purchaser; and it is a sound and established rule of equitable policy, that a trustee cannot himself be a purchaser of the trust estate, without leave from chancery; and the reason of the rule is, to bar the more effectually every avenue to fraud. This rule was recognised by this court in the cause of *Munroe and others* v. *Allaire;* but a distinction was there taken between the case of a suit against a trustee, *to set aside a purchase, he having procured the formal legal title, as in the present case, and where a suit was by him commenced to complete his purchase, as in the case cited; and it was observed, that in the former case, and the observation is consequently applicable to the present case, that equity would not interfere as of course, to set aside the purchase; for although equity will not aid, it is not bound in every case to disturb such a purchaser. It has also been made a question, whether the rule would apply to the case of a trustee, who was himself a *cestui que trust*, and was obliged to purchase, in order to avoid a loss to himself by a sale at a less price. But I shall forbear for the present from giving any opinion, whether these distinctions are well taken or not, because the rule being admitted to be absolute and universal, it is still agreed, that the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard. What shall be termed a reasonable time, is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be guided by sound discretion in the court. In this case, the *cestui que trust* comes after sixteen years, finding it a gaining bargain, and being all that time under no legal disability. Is this coming within reasonable time, to set aside a sale on the ground of this technical rule of

1796.

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5 *Ves.* jun. 680, 681, 682.

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equity? Suppose the mortgagee, instead of selling the lands, had entered into possession of them, under the mortgage, and enjoyed them as his own: twenty years' possession in such a case would have been a bar to a bill to redeem. This is a settled rule in chancery. And ought not sixteen years' possession, after a sale according to the directions of a statute, and which is a species of foreclosure by law, to be esteemed equal to twenty years' possession, commencing without such solemnity? In the case of *Wichalse, executor*, v. *Short*, the party came into chancery to redeem eleven years after a foreclosure, and that too on the ground of a *parol* declaration of the mortgagee, that he was willing to receive back his money; but the court of chancery held, (and the decree was affirmed in the house of lords,) that the mortgagor came too late after a lapse of eleven years, and that it would be a bad precedent to open the foreclosure, as it would render the property, acquired under such circumstances, extremely precarious, and would be attended with mischievous consequences to the mortgagee, who, in the mean time relying on his title, had improved the estate, and *kept no account of the rents and profits. Such a practice would shake an abundance of titles. In the case, likewise, of *Lants* v. *A. and W. Crispe*, a rule to redeem was refused, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent. These cases are certainly not stronger than the present, and I think the acquiescence of the *cestui que trust* in the purchase by the mortgagee, and which is necessarily presumed from his delay, ought now to conclude him. The allowing him to redeem, would establish a precedent much more impolitic and inconvenient in its consequences, than the violation, in this case, of the rule, that a mortgagee shall *not* purchase. I conclude, therefore, under the circumstances of this case, none of the objections raised are sufficient to justify the setting aside the sale of 1784, and consequently that the decree of the court of chancery ought to be reversed, and that the bill below to redeem be dismissed with costs.

3 *P. Wms.* 287. 3 *Bro.* 641.

1 *Bro. Par. Ca.* 414. 2 *Eq. Ca. Abr.* 177. *S. C.*

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John B. Church *against* John Bedient, Gideon Kimberly, and Walter Hubbell.

On a capture, restoration, and abandonment, the fact of restoration, though unknown at the time of abandoning, takes away the right of abandonment & claim for total loss. The assured, under such circumstances, being entitled to recover only according to the final event.

IN error, on a bill of exceptions to the supreme court, in an action on a policy of assurance upon the brig *John*, valued at $5,000. The vessel had been captured on the 19th of *January*, acquitted on the 20th of *February*, and restored to the captain with freight amounting to $2,000. He then refitted and repaired her at an expense of only $800, and proceeded on his voyage. On the 5th of *March*, the assured, being unacquainted with the restoration of the vessel, abandoned; after this, the *John* arrived, and, on a tender to the underwriters, being refused by them, she was sold by the assured, who, with the money in their hands, brought their suit against the plaintiff for a total loss, averring it by capture. Mr. Justice *Radcliff*, before whom the cause was tried, charged that as the assured were, on the 5th of *March*, when they abandoned, ignorant of the fact of restoration, which took place on the 20th of *February* preceding, they had a right to abandon, and claim for a total loss; that being so entitled, they were by law warranted in demanding the whole amount, without deducting any thing for the proceeds of the brig.

Pendleton, for the plaintiff. The questions arising on this case are, whether an abandonment can be made, after a restoration *in fact, though the assured be ignorant of such fact at the time of abandonment made? Secondly, whether, allowing the abandonment could be made, the assured in this case ought not to set off, or deduct from his demand the amount received from the sale of the brig? As to the first question, it is to be considered that a policy of insurance is not a contract against this or that event, but against loss. It engages for nothing more than an indemnification. If the loss be total, the whole sum insured will be the amount of compensation; if it be but of a part, a

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partial recompense only can be demanded. From an equitable construction of the instrument, a loss is allowed to be total, when more than half the subject matter of insurance has been destroyed, or the voyage totally defeated. This has given rise to the doctrine of abandonment, on making of which the property saved is relinquished to the underwriter. If a capture takes place, the uncertainty whether the whole will be actually lost or not, admits of abandoning: but when the property is released, this conclusion fails. When therefore it is in the possession of the owner or his agent, the loss incurred is no more than what is paid for its recovery, or in expenses on it. The result is, that while the capture continues, the right of abandonment exists, and if then made, the underwriter must pay the whole amount, and take the chance of the property being afterwards recovered. But if the property be restored previous to abandoning, then the fact of loss has ceased, and the only claim can be for the injury sustained. It is the fact which gives the right of abandonment: if there is no existing fact, there can be no right; and if no right, no abandonment. The loss must continue to the time of abandonment made. In *Goss* v. *Withers*, 2 *Burr.* 696. Lord *Mansfield* is made to declare, "there is no book, ancient or modern, which does not say the assured may, on a capture, abandon and claim as for a total loss." But on explaining these very words in *Hamilton* v. *Mendez*, 2 *Burr.* 1212. his lordship says, "the proposition was applied to the subject matter," and in pronouncing the judgment of the court in this last case, he lays down these principles: "The plaintiff, upon a policy, can only recover an indemnity according to the nature of the case *at the time of the action brought*, or (at most) *at the time of his offer to abandon.*" In *Mills* v. *Fletcher*, *Doug.* 219. and *Cazalet* v. *St. Barbe*, 1 *D.* & *E.* 187. these cases are referred to and acknowledged. **Roccus*, No. 50. cited in *Park*, 144. is to the same effect. So is 2 *Val.* 143. Nay, he thinks payment of the money should be the only criterion. In *M'Masters* v.

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Shoolbred, and *Furneaux* v. *Bradley*, *Park*, 166. the same doctrine is maintained. The right of abandonment cannot depend on an erroneous opinion. For the belief of a fact to exist, when that fact does not exist, can never give a right against the truth of the case. It is the final event which ought to regulate; and if on that it proves a partial loss, the recovery cannot be for a total. On the second point, if the abandonment is valid, the money received by the assured must belong to the underwriter, and be an extinguishment of the defendants' demand to the amount of the sum received. For if insurance is a contract of indemnity respecting a particular thing, and the produce of that thing be received by the underwriter, the difference between the produce received and the value insured, is all the injury that can have been sustained. In *Pringle* v. *Hartley*, 3 *Atk.* 195. it is laid down that the value saved, if in the hands of the assured, must be deducted from the recovery on the policy; but if none has come to his hands, the jury cannot take any notice of it. It follows therefore that what has come to his hands, they must notice.

Henry and *Caines*, contra. The effect of the argument on the first point is to prove, that, though an abandonment has been made instantly on the knowledge of a capture, yet if at the time of abandoning there has been a restoration, it does, though unknown, avoid the abandonment, and the assured can recover only for a partial loss. An abandonment, in its very nature, contemplates restoration or recovery. When all is gone, an abandonment is an absurdity,* and therefore in cases of absolute total losses, an action may be brought for a total loss without abandoning. It is singular that the existence of that, on the supposition of which the whole doctrine of abandonment is founded, should take away the right to abandon. This is to make the cause destroy the effect. Abandonment is the exercised right given to the insured by his policy. It is his exercised right, because not obliged to make it. *Marsh.* 511.

* *Camberling* v. *M'Call*, 2 *Dall.* 280.

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513. On the happening of the accident insured against, he is entitled to exercise this right. The contract of the underwriter is to indemnify against certain perils and losses, of which capture is one. The nature and effect of capture, is to induce a *primâ facie* *total loss, and enable the assured to recover for such. *Marsh.* 483. *Goss* v. *Withers*, 2 *Burr.* 696. This arises, not only from the words of the contract, but the reason of the thing; for, on a capture, all the dominion and power of the assured over the object of his insurance is gone. The *spes recuperandi* does not suspend the right to demand for a total loss, and complete justice is done by putting the underwriter in the place of his insured. Per Lord *Mansfield*, 2 *Burr.* 697. That a restoration, prior to an abandonment, takes away the right to abandon, proceeds on the idea of restoration constituting a part of the contract. This is not so. The contract is against the happening of certain events. On the taking place of any one of these, the contract is broken, and on the breach arises the right of the assured. To argue that a fact not mentioned shall heal this breach, is to say that a contract, broken on an event contracted against, shall be restored by an event not contracted for; that what is expressed, shall be controlled and annulled by what is not expressed, and this in subversion of the maxim of *de non apparentibus, et de non existentibus eadem est ratio.* Capture gives the right to abandon; all that is required is, that it be asserted by the assured speedily, and so soon as he receives the information of his loss. *Mitchell* v. *Edie*, 1 *D. & E.* 608. *Marsh.* 510, 511, 512. *Alwood* v. *Henkle*, *ibid.* 513. When thus asserted, it has relation to the period when the accident happened. *Marsh.* 519. Without this construction, the right of abandonment would be perfectly illusory. Suppose a capture in the *East Indies*, and the vessel carried into *Calcutta*. Six months may elapse before information of the event is received. Must another six months pass over before the assured can be certain of his right? It is the capture, or *casus*, which gives it him.

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Election and notice are assertions of that right, which render it vested in him, and absolutely change the property to the assurer, whose agent the assured from that instant becomes. The effect of election, as to the vesting of rights, is not confined to cases of insurance; it is to be traced in every part of our law. If a contract be dependent on an agreement, and the party for whom intended disagree, it can never after be affirmed. *Whelpdale's* case, 5 *Rep.* 119. For where a right is vested, nothing but the act of the party can devest it. If *A.* is in execution at the suit of *B.* and *I. S.* desires *B.* to let *A.* go at large, and he will satisfy the debt, to which *B.* *agrees; though *I. S.* before any thing done in pursuance of this promise and agreement, comes to *B.* and tells him, that he revokes his promise, and that he will not stand to it; yet such revocation cannot be pleaded in bar to the action. 1 *Roll. Abr.* 32. The reasoning is, that, by the election to accept the offer of *I. S.* a complete right vested in *B.* on the contract of *I. S.* So here, the contract of the insurer is for a certain sum, to pay on a certain event, if the insured elect to demand. On this election made, every ingredient for a perfect vested right occurred. There was the consideration, in the premium; the promise, in the contract; the breach, on the accident; the right, on the election duly noticed. On the sacredness of vested rights, those of property in a great measure depend. A contingent remainder may be destroyed whilst contingent; but the instant it vests, the act of the party is necessary to affect it. After breach of the condition of a bond, the tender of principal and interest, and refusal by the obligee, cannot, by the common law, be pleaded in bar to the action. *Underhill* v. *Mathews*, *Bull. N. P.* 171. Because the breach vested the right. The only restriction of the right to abandon is, "that when information of the loss reaches the assured, they must make their election, whether they will abandon or not." *Per Buller*, J. in *Mitchell* v. *Edie*. *Hamilton* v. *Mendes* proves only that the assured cannot abandon, when the information of cap-

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ture is accompanied with information of restitution and safety. The case was nothing more than an equitable exposition of the contract of insurance, made in the same spirit as that which influenced our legislature in the act for the† amendment of the law. For, as this was passed to soften the rigour of the common law on a breach of the condition in a bond, so the judgment in that, was to temper the strictness of legal construction on policies of insurance, in cases exactly similar, and is no further applicable. It is a mitigation of strict insurance law; it qualifies the right by the knowledge of the fact of restitution. If the insured, at the time of abandoning, is ignorant of any fact that can restrain or qualify his election, it must be considered as made in pursuance of the right arising from the capture. To test the right to abandon, by the facts in the knowledge of the assured when the abandonment is made, is the best rule. First, from the nature of the right. It is to transfer the property to the insurer for its value, that he, as the insured *has lost his dominion over it, might pursue his own course for its recovery, and not be liable to be called on for average losses incurred by the conduct of another. Secondly, from its end. It is to encourage commerce; to enable the party, without any encumbrance from the difficulty of recovery, to be, at the end of thirty days after proof of loss, in possession of his funds, and employ them in other mercantile adventures. Thirdly, this end is defeated, if any hope be left in the insurer to convert, by delaying to acquiesce, the total into a partial loss. If the facts known at the time of abandonment, are not made the criterion of the right to abandon, advantages are given to the insurer over the insured. The latter is bound to make his election immediately; the former, after delay, and finding the state of the market, would acquiesce or not, according as prudence and interest might dictate. The opinion of *Valin*, in his 2d vol. pages 143, 144. has been cited as to the effect of subsequent events, on a prior abandonment; but in the notes to a former page in the same volume, he

† 1 *Rev. Laws*, 349.

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himself cites a *French* decision, to the contrary of what he lays down. *Emerigon*, a weightier and more recent authority, in his 2d vol. c. 17. s. 6. answers the points insisted on by *Valin*, and is clearly against them. Where a person has been legally authorized to act, what he does in virtue of that authority, though after it has determined, cannot, if *bona fide*, and without knowledge of the determination, be on that account impeached. A conveyance under a letter of attorney revoked, is good, if without notice of revocation. To permit, in the present case, the subsequent fact of restitution to invalidate the abandonment, will be to affect with notice when a want of knowledge is confessed. The state of things at the time of suit brought, has been mentioned by Lord *Mansfield*, as showing it must influence, from analogy to the cases of actions for waste, and against sureties. In the first instance relied on, the repairing before suit brought, is a bar, because there must be a view to judge of the waste, which, by the reparation, is rendered impossible. 5 *Rep.* 119. *Whelpdale's* case. But even then it must be specially pleaded. 1 *Inst.* 282. With regard to suits against sureties, the *casus fœderis* is indemnity alone. But this very point relied on in the argument of this day, by the opposite counsel, was urged and decided in the case of *Storey* v. *Brown*, cited in 5 *Bro. Parl. Ca.* 139. *in notis.* The vessel was insured to *Gibraltar*, for *which place she was chartered. She arrived there, was captured, proceeded against, and restored to the captain, who went on another voyage in her. In an action against the underwriter, he relied on there having been no total loss, and the restoration to the captain as the agent of the insured, and by him sent on another voyage. But it was answered that the capture at *Gibraltar* was a breach of the policy, and the plaintiff had judgment for a total loss. After capture, the master is the agent of the underwriter; a restoration to him is therefore a delivery to the underwriter, and this can never defeat a right of the underwritten. The same point was determined in the supreme court of this state, in the case

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of *Murray* v. *United Insurance Company;* and in *Slocum & Burling* against the same, it was thought so clear, that the counsel for the defendant did not attempt to argue it. In this last case, the vessel was in port when the action was brought. On the second point, we do not deny that the amount of the proceeds of the vessel belongs to the plaintiff, nor that the defendants are trustees for him; but, under a plea of the general issue, he can have no advantage of it. Under that, nothing can be received in evidence but payment, *Bull. N. P.* 152, 153. unless notice of set-off had been given under the statute.

Harison, in reply. The engagement of the contract of insurance is not to pay the full amount of the policy on the happening of any one of the events contracted against. It is to indemnify for the damage of that occurrence. Were it otherwise, there could be no partial losses. It is not therefore correct to say, whenever an accident happens, there is a vested right to claim for a total loss; for the question instantly arises, what is the extent of the injury in consequence of the accident? Most certainly, when there is a calamity which creates a total loss, there is a breach which gives that vested right insisted on. But the question on every accident is, is it an average or total loss? and this is always a subject of legal consideration. Whatever does not go to the total destruction of the voyage, is an average loss. *Marsh.* 506. Thus, temporary detentions and repairs are average losses, and on payment of the expenses incurred, the contract is complied with. Detention, and capture, as a species of detention, may be total losses, but then they are only technically so, and when they no longer continue, cannot be so considered by the insured. He cannot, when this artificial loss is done *away, act upon it as a total loss which abides for ever, and abandon by force of the *casus*, when the *casus* is passed. The right of abandonment, in cases of technical loss, must depend on the fact of its existing when the abandonment is made. This doc-

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trine cannot be inconvenient in its application; if any considerable delay take place by the capture, it will always furnish time to abandon whilst it lasts. On the contrary, if every little interruption is to enable the assured to turn the loss on the underwriter, it will open a wide door to fraudulent practice. The cases in *Great Britain*, and even in the supreme court, are not authority here; for, it is against that very authority we now apply. This is the highest branch of our judicature, and, as the point has never before been here agitated, it is open for determination. In making it, the *English* books furnish but few decisions; for the first case on the subject of abandonment, is that of *Goss* v. *Withers*, in 1757. It however confirms our positions, and expressly lays down, that "no capture by the enemy can be so total a loss as to leave no possibility of recovery." The authorities adduced by the associate counsel who opened this case, all show the loss must continue to the time of abandoning, and perhaps to that of action. The case from *Brown's Parl. Rep.* was on a wager policy,* and in them, as there is no interest, there cannot be any abandonment. The mere accident, therefore, on a wager policy, gives that vested right which has been so strongly insisted on. *Pringle* v. *Hartley*, is decisive on the second point.

* It does not appear so from the case, unless the words "valued at the sum insured," will create a wager policy, for which, neither in *Park* nor *Marshall*, do I find an authority.

The case of *Hallett* v. *Peyton*, standing next in order, and embracing the same point as to abandonment, the court declined pronouncing judgment till that should be argued.

Richard S. Hallett *against* Henry Peyton.

THIS case also came before the court on a bill of exceptions. The points relied on were, 1st. That the seal of

S. P. as the preceding case.

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a foreign vice-admiralty court was not in itself any evidence; but, to make it so, required testimony, on oath, authenticating both the seal and the signature of the judge. 2d. That, of the certificate of registry, parol testimony could not be received, it being, under the act of congress, a record. The third was as to abandonment, *and the same as in *Church* v. *Bedient*, the next immediately preceding case.

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Pendleton, for the plaintiff. It is unnecessary to argue one of the exceptions, because the judge against whose opinion the bill was sealed, has acknowledged that he erred in admitting *parol* proof of the existence of the register. The second is of the utmost importance. Upon this we contend that the papers adduced could not be legal evidence, unless accompanied by proof which would authenticate the seal of the court, and hand of the judge, or show that the condemnation was a true copy of the original sentence. It may not, perhaps, be requisite to establish by witnesses, the contents of papers under the seal of a foreign court, and under the hand of the judge who presided in it, as to the facts which took place in such court; because it may be presumed that no judge would put his signature to an untruth. But whether it be his signature and the seal of his court, must be authenticated by testimony. The reason why seals of any courts are evidence, is because our own judges are presumed to be acquainted with them. This presumption is not extended to foreign tribunals, nor to their laws, which must be proved.* To allow foreign seals to prove themselves, would open a wide field to fraud. In a case in *Espinasse*,† want of seaworthiness was not allowed to be proved by a copy of a survey. The act of congress, regulating the manner of authenticating records of judgments in sister states, is a high legislative authority, to show a seal of a foreign court cannot be received in evidence, without proof of its being actually the seal of such court. Were it otherwise, the act would have been needless. If this is the case in

* *Boehtlinck* v. *Schneider*, 3 *Esp.* 58.

† *Wright* v. *Barnard*, 2 *Esp.* 700.

regard to seals of the courts of the different states, it certainly will *à fortiori* be so in regard to seals of foreign admiralty tribunals. Even in *Great Britain*, the seals of their inferior municipal courts must be proved, for they are not in themselves any evidence. *Gilbert's Law of Evid.* by *Loft*, 22. shows that seals of inferior courts must be proved by the oath of some persons to whom they are known. In *Olive* v. *Gwin*, *Hard.* 118. the seal of the grand sessions in *Wales* was held no evidence, though the grand sessions is a court established by act of parliament. So in *Green* v. *Proude*, 1 *Mod.* 117. an exemplification of a recovery in ancient demesne, was held inadmissible without proof. An exemplification under the public seal of a foreign city was rejected, *when offered to establish the entry of goods at the custom-house. *The King* v. *Mason*, 8 *Mod.* 75. Nay, in *Henry* v. *Adey*, 3 *East*, 221. it was held, that proving the hand-writing of the judge was not sufficient in an action on a judgment rendered in *Grenada*, but that the seal ought also to be established. If this strictness will be required in *England* respecting the seal of a court in one of her own colonies, we ought to be still more strict here. In *Bernardi* v. *Motteux*,† the court refused to allow the proceedings of a foreign admiralty court to be read, unless by consent. The reason is evident; they were not authenticated. We do not say the papers adduced shall in no case be evidence; we only insist they must be substantiated, on oath, as copies of other writings are, when the originals cannot be produced, and if produced would be evidence. The true criterion as to seals of courts is, that where the law presumes them known to the judges, they prove themselves; where not, they must be proved. The point of abandonment has already been argued in the preceding cause; if on that we are correct, the judgment in this case must be reversed, however the court may think on the other exceptions.

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† *Doug.* 57[illegible].

Caines, contra. As the questions now made, come before the court on a bill of exceptions, it may not be amiss to ad-

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vert to the nature of this mode of proceeding. In jury trials, when a party denies a fact, he controverts it by evidence which goes to the jury. When he admits a fact to exist, but says it is not substantiated in the manner required by law to prove the issue, he excepts to the evidence, by insisting it cannot at that time, or in that way, be offered to the jury in support of the fact in issue. When a fact is admitted, and also that it is duly substantiated, and a party contends that though the fact is true, and well proved, the inferences from it do not in point of law maintain the issue, he demurs to the evidence. From hence it appears, that on a bill of exceptions, the person tendering it supposes the evidence true, but questions the competence or propriety of it. *Money* v. *Leach*, 3 *Burr.* 1765. Therefore the facts it contains can never afterwards be disputed.* *Show. Parl. Ca.* 120. *Bridgman and others* v. *Rowland Holt and others.* It follows also, (though the remark is not required by the present case,) that on a demurrer to evidence, the court may make any and every inference which a jury might have drawn. *Cocksedge* v. *Fanshaw*, *Doug.* 131. 134. Here then the capture, *the condemnation, and the seal, are confessed, but the reception of them in evidence is denied, for want of being duly authenticated. The question then arises, whether a seal, purporting to be a seal of a foreign court of admiralty, shall be *primâ facie* evidence without *parol* testimony of the seal and the signature of the judge? As conclusive, it was not offered. As *primâ facie*, it was open to be rebutted: it is only in case this is not done, that it becomes of any avail. But its reception is argued against, from the danger of fraud to which it would expose, as seals and signatures might be counterfeited for every occasion. It may be answered that the difficulty of manufacturing seals, papers, and proceedings, with all the *formulæ* of judicial niceties, would be insurmountable; and if they could be overcome, the circumstance of an oath, in this age of depravity, would be no obstacle to their authentication. The danger then of fraud, is not one atom diminished by the

* This may perhaps be, because it is an acknowledgment on record.

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precaution intended. The keystone of this reasoning is laid upon the idea of fraud; a supposition that the law never allows to be made. So little is it countenanced by any authority, that it is laid down in 2 *Bac. Abr.* (new edit.) 600. a seal is better evidence than an oath. The rule, however, with respect to other foreign judgments, has been relied on, and a train of authorities, which it is not meant to dispute, have been cited, to show not only the seal of the court where pronounced, but the hand of the judge who presided, must be substantiated. One word will suffice for all these. They were, excepting the case from *Espinasse*, which was a notarial copy of a ship-carpenter's survey, cases of judgments in municipal and local tribunals, proceeding according to a particular code of partial and confined jurisdiction. The courts of law are therefore not supposed to be conusant of the seals of *fora*, acting under a system which they do not acknowledge. This is not the case here. Courts of admiralty are held in all countries under one and the same law, the law of nations, equally in force in all. The reason on which a judge of the supreme court is supposed to know the seal of a court of common pleas, is, that each is a court of the same jurisprudence; acting under the same system, on the same principles, and its jurisdiction running in the same country. Wherever the jurisdiction is acknowledged, the seal of the court is supposed to be known. If then it can be shown, that what takes place in a foreign court of admiralty, is recognised and *available of here, by process under * 52
the seal of such court, it follows that such seal must substantiate itself. In 1 *Roll. Abr.* 530. pl. 12. this is said to be the law: "If a *Frizlander* sue an *Englishman* in *Frizland* before the governor there, and recover against him a certain sum of money, which the *Englishman*, not having enough to satisfy, comes into *England*, upon which the governor sends his letters missive" (*which are always under seal*) "into *England*, asking all the magistrates within the kingdom to cause execution of the said judgment; the judge of the admiralty may execute that judgment by imprison-

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ment of the party, and he shall not be liberated by the common law. For it is according to the law of nations that the justice of one nation shall be aiding to the justice of the other, and the one execute the judgment of the other: and the law of *England* takes notice of this law, and the judge of the admiralty is the proper magistrate for that purpose, for he only has execution of the civil law within this realm. *Wier's* case resolved upon a *habeas corpus*, and he remanded." It is evident that in this case, the authority of the imprisonment, which was founded on the letters missive, must have been before the court. No mention is made of the manner in which they were substantiated. So in *Jurado* v. *Gregory*, 1 *Sid.* 418.† "Where sentence is obtained in a foreign admiralty, one may libel for *execution* thereof here, because all the courts of admiralty in *Europe* are governed by the civil law, and are to be assistant one to the other, though the matter were not originally determinable in our court of admiralty." This case shows how fully admiralty jurisdiction extends over all civilized countries. It marks too the distinction between judgments in those courts, and judgments in foreign municipal tribunals. In the admiralty, a libel may be filed for *execution* here, of a judgment abroad, in the same manner as an action may be maintained on a judgment in the supreme court, to obtain the benefits of it without examining into the merits on which it was rendered. As, then, the jurisdiction of the law of nations is acknowledged here, the courts of admiralty act under that jurisdiction. The seals of these courts must be supposed to be known here, like the seals of all other courts proceeding under the same authority. But it is not merely the seals of courts under the law of nations that are received as evidence; the seals of the officers of that law are equally
* 33 *good testimony. The seal of a foreign notary public is evidence. Wherever the jurisdiction of a court runs, its seal requires no evidence to prove it. Judgments in the courts of the *United States*, are therefore evidence when under the seal of the court where pronounced, without proving the seal

† *S. C.* 1 *Vent.* 32.

or signature of the judge. In *Jenkins* v. *Silas Pepoon*, debt was brought on a judgment rendered by the district court of the *United States*, for the district of *Massachusetts*. On a plea of *nul tiel record*, the plaintiff's counsel offered an exemplification of the judgment under the seal of that court. It was objected on the part of the defendant, that the act of congress respected only judgments of state courts; that it did not provide for the admission of judgments in the courts of the *United States;* that therefore proof should be made of the seal, or of the matters exemplified. The court, however, admitted the record unanimously, on the principle that it was a court of general jurisdiction, its seal therefore to be noticed by all courts, as carrying in itself evidence of its own genuineness. Against the reasonings on behalf of the plaintiff, the argument from inconvenience alone would be irresistible. Suppose a capture, and the vessel condemned in *Bombay;* after the proceedings have beeen transmitted here, must they be sent back under a commission to be identified? The delays, risks of miscarriage, and expense, would be intolerable. Another reason may be assigned why, in the present case, the seal need not have been proved. It was a collateral fact immaterial to the point in litigation. The record of the sentence (if it may be so termed) was not in issue. Therefore a seal to it was not requisite to make it testimony. "There is a difference between pleading a record, and giving it in evidence. If pleaded, and the issue *nul tiel record*, it must be *sub pede sigilli*, or the judges cannot judge thereof; but, where it is given in evidence on a collateral fact, if it be not under seal, the jury may find the same, if they have *other good matter of inducement* to prove it." *White* v. *Pynder*, *Styles*, 22. The same authority may be used against the second point, that a register of a vessel is, by act of congress, a record, and does not admit of *parol* proof; for the register was not in issue. It was not the matter in contest. The interest was the only subject of litigation. The exception cannot mean that a register is a judicial record, because it must then be

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an absolute verity,† *never to be contradicted; not even admitting of proof that it once was wrong.‡ If a ship's register be not a record in the strict technical sense of the word, it is not proof of the facts it contains. It can amount to nothing more than *primâ facie* evidence. That which we adduced was equally *primâ facie* testimony. Between two equals there can be no difference. Then why prefer the register? The same weight of evidence is in one case as the other. To establish that the register of a vessel cannot be a legal record, and therefore that proof *aliunde* of it, and its contents, may be resorted to, the very act itself, under and by which it was created, is an authority. Navigating contrary§ to the ownership expressed in the register, is, by the provisions of the statute, a forfeiture of the vessel. On an information for such a breach of the revenue law, the facts contained in the register are the very subject of dispute. An instrument then, the facts in which are controverted by other facts, and go to a jury trial, can never be a legal record. When the question is as to the qualification of the vessel, as to what privileges and immunities she may demand, then the register may be the only evidence allowable: but to determine to whom the vessel belongs, it is only, *e pluribus unum*. The effect of a register may be illustrated by the following case: Suppose an act passed, authorizing commissioners to grant to persons swearing themselves entitled to lands, certificates, on production of which they should have a right to vote at elections; this certificate would be conclusive evidence of their right of suffrage, but would never establish their title to the lands. A doubt may be entertained how far the register is evidence at all. It is obtained on the oath of the party himself. It is contrary to legal principles to allow a party to testify in his own cause; this, however, is done in the fullest degree, without even the chance of cross-examination, if the register granted on his oath, is evidence of the facts he has sworn to. But allowing the register to be evidence, as the original is at the custom-house where granted, a copy only could have

† *Co. Litt.* 117. b.

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‡ *Dickson* v. *Fisher*, 1 *Black. Rep.* 664.

§ *Register Act*, sec. 11. 16. 27.

been produced. This copy would not have proved any thing of itself; it must have been corroborated by the affidavit of some one who had compared it with the original, and would have taken all its effect from the oath. In the present case, the same sanction is afforded, for the witness swears to seeing the original in the name of the plaintiff below. The very fact, *then, which the copy would have established, has been substantiated by oath. But where a deed is lost, a simple copy without witnesses, and unsupported by affidavit, will be allowed in evidence.† 1 *Lev.* 25. *A fortiori* in such a case it may be proved by witnesses, that there was an original which they saw. Under our register act, however, it is to be observed, that the register is not a proof of property. The register may be in the name of one man, and the legal right of ownership in another. With us, the only consequence of a false recital of the owner's name, as it regards the property, is, that the vessel is not entitled to the privileges‡ of an *American* vessel. But under the *British* statute, a false recital renders the transfer null and void,§ so that no property passes. *Rolleston* v. *Hibbert*, 3 *D.* & *E.* 407. *Camden* v. *Anderson*, 5 *D.* & *E.* 709. *Westerdale* v. *Dale*, 7 *D.* & *E.* 306. *Moss* v. *Charnock*, 2 *East*, 349. It was on the principle stated in the distinction taken, that the decisions in the cases cited entirely rested, no one of which was on a policy of insurance. In actions on these it is not necessary to prove a strict legal title. An equitable, nay, a possible interest is sufficient. This appeared from the sentence acquitting the vessel as neutral, and from the proof of the citizenship of the now defendant. It is not said the proof was conclusive. It was *primâ facie*, enough to go to a jury, and if not rebutted, then it became conclusive. The object of the act was not to confer on registers the character of legal records; it was to use them as mere memoranda, for the purpose of informing the custom-houses what tonnage duty ought to be paid. This is further evinced by the act specifying what vessels shall sail under records, and what under registers. Under the for-

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† The copy, in this case, was of an old deed, and was found among the muniments of the estate. It was observed also in the case, that many of the old deeds were without witnesses.

‡ *Register Act*, sec. 14.

§ 26 *Geo.* III. c. 60. sec. 17.

‡‡ *Lucena* v. *Crauford*, 3 *Bos.* & *Pul.* 75.

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mer, are to navigate all those built in the *United States*, but owned wholly or partly by foreigners; under the latter, all so built owned entirely by *American* citizens. The first pay thirty cents *per* ton, the other six. The word record, when used therefore in our laws, signifies no more than an office memorandum. It is exactly synonymous. In our state law respecting mortgages, it is said to be unnecessary "to record *or* register at full length the certificate." 1 *Rev. Laws*, 480. sec. 4. So in the register act itself, sec. 9. the collector is ordered to "make and keep in some proper book a record *or* registry thereof." The same in sec. 26, 27.

* 36 So in the act to regulate the collection of duties *on imports and tonnage, sec. 21. collectors, naval-officers, and surveyors, are directed to keep "true accounts *and* records" of all their transactions. 4 *Laws Unit. Sta.* 315. Being coupled with the word accounts, shows the meaning of the term, *noscitur à socio*. If the appellation of a record is, whenever applied to any writing in a statute, to give it the force and efficacy of a legal record, what a host of judicial records of absolute verity shall we have! Every permit, every custom-house paper, would be a record. For records must be so either in the legal, or the vernacular acceptation of the word. There is no third or hermaphroditical sort, partaking of the natures of both. Whenever a record is ordered by an act to be made of any transaction, if it is to have any peculiar weight as evidence, that weight is always declared. Thus, in our state law, relating to the proof of wills in the court of common pleas: "and the record of the said will so proved and recorded, shall be as good and effectual in all cases, as the original wills would be if produced and proved." 1 *Rev. Laws*, 179. sec. 6. So *ibid.* 317. sec. 7. relative to the records by surrogates: "which records shall be of the same force as the like records in the office of the judge of the court of probates of this state." So the certificates given to paupers by their towns, when filed and *recorded* by the town clerk where they come to reside: "every such certificate, so acknowledged or proved, and allowed as

aforesaid, shall be deemed in all courts whatsoever within this state as duly proved, and shall be taken as evidence without any other proof thereof." 1 *Rev. Laws*, 570. sec. 12. The laws of the union are in exact coincidence on this point with our own. By the act imposing a direct tax, 4 *Laws Unit. Sta.* 174. sec. 6. the absence of commissioners from meetings is to be recorded and noted in a book, together with their excuses for not attending, the transcripts from the records of which are "declared to be conclusive and legal evidence." By the 25th section of the same statute, page 187. the alienations of lands assessed, are to be recorded. Does this shut out all proof of title by any thing less than matter of record? The truth is, that acts prescribing registers and records, do not abrogate proof by any other mode. Therefore, though the 26th *Geo.* II. c. 33. sec. 13. ordains that a registry shall be kept of marriages, it does not exclude the presumptive evidence arising from cohabitation. 4 *Bac. Abr.* (new edit.) 537. In *the next place, when transactions in foreign states are to be established, there is some relaxation in the rule as to adducing the best evidence the circumstances could afford. In *Wallis* v. *Delancey*, cited in *Barnes* v. *Trampowsky*, 7 *D. & E.* 266. on a bond, the hand-writing of *one* witness only was proved. With regard to the other, there was no evidence that he was either dead or abroad. The defendant contended it was not the best evidence the case would furnish. Lord *Kenyon*. "This is a foreign transaction. The proof *might be more perfect*, yet it was sufficient and reasonable evidence for a jury, at least, unless *rebutted* by some evidence on the other side. The expense in sending a commission would, in many instances, be more than the value of the sum in dispute." There is not a word in this decision which does not apply to the present case. On the score of inconvenience argued against the first exception, it is conclusive. On the point of presumptive and *prima facie* evidence, it is parallel; for the individual states, with respect to each other, are foreign countries, under distinct

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and independent sovereignties. The exceptions appear to urge, as erroneous, the admission of parts of the proceedings in the admiralty under the seal of that court. It has not been insisted on in argument, but it may not be improper to observe, that so much only of a record as concerns the matter in question need be given in evidence. To prove the filing of a declaration, it surely is not necessary to show the writ. The whole end of the exceptions before the court, is to gain a new trial. On this subject, if the same considerations can be here entertained, it is laid down, that they are not granted on nice and formal objections, which do not go to the real merits. 3 *Black. Comm.* c. 24. So if the verdict of the jury be agreeable to equity and justice, the court will not grant a new trial, though there may have been an error in the admission of evidence, or in the direction of the judge. *Wilkinson* v. *Payne*, 4 *D. & E.* 468. The conduct of the plaintiff in error determines the justice of the case. He does not deny; nay, by the course he has taken, he confesses the facts offered in testimony. He does not rebut, or offer to do away the presumption arising from them, and therefore we may say, *stabit presumptio donec probetur in contrarium.*

Pendleton, in reply. The rule of law is, that all evidence ought to be at the trial. What the weight of that evidence
* 38 *might be, cannot be now taken into consideration. The only point is, was it properly received? Therefore, however the facts are admitted, no advantage can arise in this court upon those admissions. Nothing has been said to show the proof of the seal of the vice-admiralty court ought to have been dispensed with. That courts here may be applied to for execution of an admiralty sentence, is not law, and would be ridiculous in any country. The whole train of argument, as to evidence of the register, goes upon the idea of its having been lost; but as the vessel was restored, the presumption is, her papers were with her, and in the power of the plaintiff, who ought therefore to have produ-

ced the one granted by the custom-house at *Charleston*, or have shown why that could not be had. On any ground, therefore, we presume a new trial must be granted.

Per Curiam, delivered by LANSING, Ch. The plaintiff in error relies upon two points, for the reversal of the judgment rendered in the supreme court in the first of these causes. His counsel have stated them, and insisted, 1st. That the brig *John*, having been released fourteen days before the abandonment, *the mere ignorance of the owners of that circumstance*, could not give them the right of abandoning the brig to the insurers, which it was admitted they could not have done, if they had known the real truth on the subject; and, 2dly. That the money received by the owners for the brig, ought to have been deducted from the same, as the underwriters were liable to pay, and the assured entitled to recover, only for the difference between that sum and the sum insured. These questions, it appears, arose at the trial of the cause at the sittings, and the Judge who presided, decided the suit on the authority of the case of *Mumford* v. *Church*, which was very fully and ably argued, while I was in the supreme court, in *July* term, 1799; and, after much deliberation, the whole court united in opinion, that the abandonment was conclusive. My note-book is not now within my reach. I cannot therefore resort to it to refresh my memory, but I have a copy of the case which was stated by the parties in that cause, and from that it appears, that the policy was on the brig *Betsey*, which sailed from *New-York* for *Petit-Guave*, in the island of *Hispaniola*, on the 12th *May*, 1798; that she was captured by a *British* cruiser on the 26th day of the same month of *May*, and sent into *Port Mole St. Nicholas*, where she was detained three *weeks, and then restored upon * 39
paying charges; and that, after a further detention of three weeks, she was permitted to depart, but under a *British* convoy to *Jamaica*, from whence she returned to *New-York*. The abandonment was made the 12th *June*. The

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restoration had not taken place when the abandonment was made; for the capture was on the 26th *May*, the abandonment on the 12th *June*, and three weeks from the former of those days, during which the litigation with the captors was pending, clearly overreached the period of the abandonment. The notes which Mr. Justice *Kent* took on the subject, and which I have examined since the argument of these causes, show, that this was particularly adverted to by the court. If, therefore, the opinion given on that occasion was expressed with the latitude intimated, it was, so far as it was beyond what the circumstances of the case required, extrajudicial; and, as such, it would not now be considered as authority in the court which pronounced it. The general reasoning resorted to in the decision of cases, is sometimes calculated to mislead; but whenever it becomes necessary to examine them as authority, it must be rigidly restrained to the existing case. That the decision in this cause was supposed to be broader than it appears upon examination to have been; and that it was so received, is evident from the case of *Slocum* v. *Burling*, determined in *October* term, 1799. In this a question arose on a policy insuring a cargo which was captured, liberated, and afterwards abandoned, before notice of the liberation had been received. That case was decided without argument, expressly on the authority of that of *Mumford* v. *Church;* and on the general ground, that an abandonment once made was definitive. So were the present cases at the sittings. I however think that these cases are in no respects similar to that of *Mumford* v. *Church;* and that, even in the supreme court, they would still be considered as embracing an open question. In most occasions of maritime insurances, the remoteness of the owners from the subject insured, effectually precludes from a direct personal agency in its management, on the spot to which it may be conveyed, by any of the incalculable variety of incidents to which this species of adventure is so pre-eminently exposed. To obviate some of the inconveniences arising from

this circumstance, they are sometimes permitted to act, upon the best *information they are able to acquire of the actual situation of the subject insured, and to make such information the basis of the rights they intend to assert, in consequence of the occurrence of any of those accidents, which, in their effect, produce either *a technical or actual total loss*. But certainly, if the information is either totally unfounded, or materially variant from the truth, it would be a strange position to maintain, that its resemblance should be preferred to the truth itself. If the insurers and insured had been at the port to which the captors carried the brig, an abandonment, under all the circumstances of this case, could not have been permitted; for at the time it was made, the vessel was restored, and prosecuting its destined voyage. From the mere act of abandonment, no positive right can be derived to the insured, unless it be combined with a total loss; for if the loss should, in the final event, prove an average, instead of a total loss, the act of abandonment would be nugatory. In these cases, the loss is not pretended to be deduced from the deterioration of the vessels; the first policy was underwritten for $5,000, the repairs of the vessel amounted to about $800, and the full freight from *New-York* to *Cadiz* was paid by the captors; the amount of this loss, calculated from the comparative value of the subject insured, with the amount of the repairs, clearly, *on that ground only*, would constitute an average loss. That this is the doctrine adopted in *Great Britain*, and which still obtains there, appears from some of the cases cited. In the case of *Goss* v. *Withers*, it was made a point, whether the assured had or had not *a right to abandon*, after the ship had been recaptured and carried into *Milford* harbour. The capture was assumed, as *primâ facie* constituting a total loss. The salvage amounted to half her value; the loss of freight, the captivity of the master and mariners, the dissolution of the charter-party, and the disability of the vessel to pursue her voyage, are reasons given by the court, from which the continuance

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2 *Burr.* 683.

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2 *Burr.* 1198.

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of the total loss was to be inferred, and on that ground *only*, and not because the capture constituted a total loss, was the judgment of the court given. In the case of *Hamilton* v. *Mendes*, which arose on a policy on the ship *Selby* and her cargo, from *Virginia* or *Maryland* to *London*; the ship had been captured, recaptured, and carried into *Plymouth*, where *she arrived on the 6th day of *June*, 1760, and was offered to be abandoned, at *London*, on the 23d of the same month. The ship had sustained no damage from the capture, and the whole cargo was delivered to the freighters, at the port of *London*, who paid the freight. Lord *Mansfield*, in delivering the opinion of the court, observed, that the ship and cargo, in the case of *Goss* v. *Withers*, were literally lost. He explains the words quoted from his opinion in the latter case: "that there is no book, ancient or modern, which does not say, that in case of the ship being taken, the insured may demand for a total loss, and abandon," and adds, "but the proposition was applied to the subject matter, and is certainly true, provided the capture or the total loss occasioned thereby, *continue to the time of abandoning and bringing the action.*" He afterwards lays it down, as the point intended to be determined, *that the plaintiff upon a policy, can only recover an indemnity, according to the nature of his case*, at the time of the action brought, or at most, at the time of the offer to abandon, and observes, that the plaintiff's demand is for an indemnity. His action, then, must be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has determined that the damnification is in truth, *an average loss only*. This reasoning is adopted, after an elaborate research, after solemn argument, and deliberate examination of the theories of foreign jurists, and after a critical review of the opinion given in the case of *Goss* v. *Withers*. From these circumstances, as well as from the great talents and ability that so eminently distinguished the tribunal which

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decided those cases, they merit particular attention, and are well entitled to be considered as very weighty authority. They would have been respected as such anterior to the revolution, and, in the estimation of our courts, that authority has not been weakened by the change of government. The doctrines deducible from these cases, go the length of determining these; for they fully establish the position, that a capture may, according to circumstances, either produce a total or partial loss; as, therefore, the actual loss in the first instance, is less than one-sixth of the valuation of the brig in the policy, the abandonment could be founded only on a *partial loss*, *which of consequence, * 42
was incapable of constituting a case to warrant it. The case of *Mills* v. *Fletcher*, was decided since the revolution, on the point, that if the owner suffers so much from a capture, that it is not worth his while to pursue the voyage, he may abandon; and the reasoning in the case of *Goss* v. *Withers*, and *Hamilton* v. *Mendes*, is again recognised and enforced. I have therefore no doubt, but that these cases ought to be governed by those of *Goss* v. *Withers*, and *Hamilton* v. *Mendes*, as well on the ground of authority as the cogency of the reasons given for those decisions. As before the abandonments, the event of discharge of the vessels had constituted an *average loss only*, the defendants are not entitled to recover as for a total loss. In forming this opinion, I have not brought into view those of the foreign jurists, cited in argument. In many instances, it is useful to resort to them, to elucidate general principles; but the occasional infusion of the spirit of local codes into their general system, renders it sometimes difficult to discriminate accurately the degree of weight which ought to be attached to these opinions, on the principles they treat of. In these cases, I do not think it necessary to enter into an examination of their doctrines, as the court can repose themselves on judicial opinions, derived to us as authority. But if it were necessary, from the slight glance which has been offered, I am persuaded they are capable of being reconciled,

Doug. 219. 1 *D. & E.* 187. *Cazalet* v. *Barbe.*

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and that they would tend to corroborate the general result drawn from the cases adjudged in the *English* courts. As to the second point in the case first argued, thinking, as I do, that the first concludes against the defendant in error, if my opinion would prevail, it would not be necessary to decide on this; I shall however very briefly state my opinion on the second point also. If this was the case of a total loss, the defendants in error, by abandoning, completely devested themselves of their interest, and as they afterwards sold the vessel, if the abandonment was valid, they of course disposed of property which the act of abandonment unequivocally determined, was that of the plaintiff. This is not the case of mutual dealing, but the sum received is the price of the subject, for the damnification of which a compensation is demanded. It is a charge inseparably connected with that subject, calculated to diminish the amount of the compensation, and the forms of law
* 43 must be exceedingly rigid and *unbending, to preclude the plaintiff, (the defendant in the court below,) from entitling himself to a deduction of the amount of the sale. I therefore think this, without notice of a set-off, a proper ground for deducting the amount of the sale, after adjusting all reasonable allowances from the sum demanded by the defendants in error, and that the evidence to that point ought to have been admitted. I am, therefore, of opinion, on both points, that the judgments in these causes should be reversed.

The whole court being unanimous in this opinion, the judgments in both causes were reversed, on the point of abandonment.

Richard S. Hallett and Walter Bowne *against* Ebenezer Jenks and others.

IN error, on the judgment of the supreme court in *Ebenezer Jenks and others* against *Richard S. Hallett and Walter Bowne*, reported in 1 *Caines's N. Y. Rep.* 60. The case was exactly as it is stated there, and the arguments of counsel only a repetition of the points before insisted on in the court below.

A vessel driven by distress into a *French* port, where a part of her cargo is taken by the officers of the government, and she prevented from taking away her original lading, may, without incurring the penalties of the acts forbidding all intercourse with the dependencies of *France*, purchase and load with the produce of the country. A passport granted by any particular government, to protect against its own cruisers, is not a sailing under the protection of the flag of that government, so as to stamp a national character on the vessel.

LANSING, Ch. On this case three questions have arisen: 1. Whether the sloop *Nancy* violated her neutrality by receiving the paper described in the case as a passport, found on board at the time of her capture? 2. Whether the voyage was illegal, and in contravention of the laws of the *United States?* 3. Whether the concealment of material circumstances would avoid the policy? As to the first point, the reasons given for the judgment of the supreme court appear to me satisfactory. There is nothing beyond the mere import of the paper which can aid in giving a construction to it. In its form it professes to contain simply a request to the officers of the *French* navy and privateers, to let the vessel *pass free;* and whether it is in the ordinary, or an uncommon form, does not appear. If it was the ordinary clearance used in the island of *Hispaniola*, it could not be considered as a violation of neutrality to carry it in the vessel; and as it is expressly found by the verdict, that the passport was received on board at the *Cape*, no inference to the prejudice of the insured can be drawn from its being antedated, which *might be the effect of positive regulation; and, as it has not been found by the verdict, that it was intended to confer some uncommon privilege on the vessel, I think, under all circumstances, it must be considered as a mere clearance. As to the second question, the voyage, in its commencement, was a lawful one. It was from one of the ports of the *United States* to the *Ha-

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vanna, a *Spanish* port; and the verdict finds that the vessel was compelled, *by distress*, to put into *Cape François*, in the island of *Hispaniola*. To the time of her arrival at the latter port, nothing had been done to forfeit her neutrality; the touching at it was the effect of inevitable necessity; the unlading the cargo was in compliance with a similar necessity, *for the vessel required to be repaired*. The disposition of *the cargo* was not a voluntary act; and its conversion into the productions of that island, was so far an act of necessity as to leave only the alternative of abandoning the interest, or giving it the modification dictated by the government. The policy was made to insure the cargo, thus acquired at *Hispaniola*, against *all risks*. The intent of the law of the *United States*, seems to have been, to restrain their citizens from aiding in the *French* carrying trade, and by that means to impress the necessity of respecting our neutral rights. All the restraints imposed by the statute are upon the vessel. The vessel is inhibited from being employed in the *traffic or commerce* described in it. The finding of the jury has completely severed the vessel and its cargo; for it is found by the verdict, that, upon the arrival of the vessel at the *Cape*, the cargo *was landed, and was not permitted to be reladen*. The unlading was the effect of necessity, and though the captain disposed of the *cargo*, neither its disposition nor the new investment could be considered as the employment of the vessel; and yet the *employment of the vessel* was the only point to which the forfeiture could attach. The landing was involuntary, the relading impracticable; and though the vessel was afterwards resorted to as the vehicle of conveyance, it was to carry the property of citizens of the *United States*, acquired under circumstances of coercion, and it may literally and truly be said, in the language of the statute, not to have been employed in any traffic or commerce *with or for any person* resident within the *French* territory. The statute was limited in its operation to vessels departing from the *United States* *after the 1st day of *July*, 1798. After di-

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recting that such vessels should not be permitted to proceed to any port or place of the *French* republic, and *should not be employed in any traffic or commerce with or for any person* resident within or under the jurisdiction of the *French* republic, it adds, "and if any ship or vessel, in any voyage thereafter commencing, and before her return within the *United States*, shall be voluntarily carried, or suffered to proceed to any *French* port or place aforesaid, *or shall be employed* as aforesaid, contrary to the intent of the said act, that then the vessel and cargo shall be forfeited." The law was not intended to embarrass the citizens of the *United States* fairly pursuing the active speculations of trade. It never could have been the intent to devote to indiscriminate destruction, as well the property of those whose misfortunes subjected them to an irresistible necessity or force, as those who had voluntarily evaded its provisions; and though a variety of cases may occur in which private rights must unresistingly bend to the safety and preservation of the commonwealth, they are to be found only in the extent, as applied to great and imminent emergencies; and even in the case of treason, the authorities cited to establish the doctrine, show, that there may be exceptions to the universality of the rule. Here every fact, calculated to show that the conduct of the master was the effect of an influence he could not resist, is established by the verdict. This brings it within the purview of the first section of the statute, and appears to be contradistinguished from *voluntary* acts; for the word *voluntary* may well be considered as the adjunct to the whole sentence, and not necessarily, in sound construction, to be exclusively limited to the words *carried or suffered* to proceed to any *French* port or place as aforesaid; and I think numerous cases must occur, in which a vessel may, with as much propriety, be said to have been *involuntarily* employed in trade, as to have been involuntarily carried into port. The law of congress, of 9th *February*, 1799, is sufficiently broad to embrace this case: it provides that if it shall appear, that any ship or vessel, *seized*

Bac. 57.

4 *Laws U. S.* 129. sec. 1.

4 *Laws U. S.* 248. sec. 6.

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for the contravention of that or the former statute, was captured or driven *by distress of weather*, or was *unavoidably detained or delayed*, by some embargo, &c. or *other unavoidable casualty*, without any *fault*, *wilful negligence*, or *intention to evade* the provisions of the said statutes, the secretary of the treasury may direct a restoration, of the *vessel and cargo*. If it could be brought within the provision of the last statute, the decision of the secretary might, even *after a seizure*, have constituted this a legal voyage. The case of *Richardson* seems to have some analogy to this; but we are totally unacquainted with the reasons which influenced the court in that case, and I think too imperfectly acquainted with its merits, to consider it as having any weight here. The concealment of material circumstances is the last point. The cargo of the vessel was insured on a voyage from *Hispaniola* to *St. Thomas*. As the insurance was made after the passing of the second act, and from it, circumstances might exist to constitute the voyage from *Hispaniola* a legal one; with a full knowledge of this circumstance, the insurers underwrite against *all risks*. But it has been said, that the time of the departure of the *Nancy* from the *United States* does not appear to have been disclosed to the insurers; and hence it is inferred, that there was a concealment of a material circumstance. The allegation of *concealment* is in the nature of an *avoidance*, and must either be pleaded or averred, and in all events must be proved, or it cannot, in legal operation, avoid a contract, in other respects valid. It is alleging the existence of a fraud, and is of itself a substantive and effective defence, capable of destroying the contract. Nothing of this kind appears in the record; and in pronouncing an opinion in this case, the court are necessarily confined to the record. For these reasons, I am of opinion the judgment in this case ought to be affirmed.

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L'Hommedieu, Senator. Two months had elapsed after the vessel's sailing, before the insurance was made. It was

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then effected at a *premium* of twenty-five *per cent.* This is evidence of extraordinary risk; and it is more probable that the insurers knew of her situation, than that the insured made any concealment. We cannot suppose the insurers would have asked so high a *premium*, if they had not known her situation, in what port she lay, and the possibility of her sailing with such papers. But these cannot be said to enhance the price of insurance, as they would be rather in favour of her safety than against it. The captain did not go to a *French* port *voluntarily*. After he was there, and could not bring away his property, it was more to the interest of the *United States*, that he should bring some equivalent, than to leave *the whole, never to be recovered. On this ground, among the others already stated by the court, the conduct of the assured ought not to be considered against the intent and meaning of the laws of the *United States*. I shall only observe, that it is probable that the vessel could not have escaped, or come from a *French* port, without the clearance or certificate found in her, but at the risk, perhaps certainty, of being taken by the *French* cruisers, who knew her situation. On the whole, I am of opinion, that the judgment of the supreme court ought to be affirmed.

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The whole court concurring, the judgment of the supreme court was unanimously affirmed.

Thomas Waters, Richard Thorne, and Sarah his Wife, Appellants, *against* John Stewart, Respondent.

THIS was an appeal from a decree of his honour the Chancellor. The complainants filed their bill, as well in behalf of themselves as others, the heirs and devisees of *Sarah Wisner*, deceased, who might come in and contribute, &c. &c. The bill set forth an indenture of three parts, da-

Under our act concerning judgments and executions, an equity of redemption may be sold by the sheriff, under an execution on a *fi. fa.*

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ted the 8th *April*, 1769, between *Henry Wisner*, since deceased, of the one part, *Sarah Waters*, since deceased, of the second part, and the complainant, *Richard Thorne*, of the third part; which indenture was admitted by the defendant; and among other things, as far as it is material, substantially contained as follows:—That in consideration of a marriage about to take place between the said *Henry Wisner* and *Sarah Waters*, she had conveyed to him all her estate, real and personal, authorizing him to sell and dispose of the same; the moneys thence arising to be enjoyed by the said *Henry Wisner*, during the joint lives of him and the said *Sarah*, he maintaining and educating three children of her's by a former husband, namely, *Elizabeth*, *Hannah*, and *Thomas Waters*, till they should come of age, or marry, if the said *Henry* should so long live. But in case the said *Sarah* should survive the said *Henry*, the money arising from her estate as aforesaid, should be paid to her; and in case he survived her, it was to be paid to her children before named; and that in such case she should have and enjoy during her widowhood, a dwelling-house and *farm of his, situate in *Goshen*, containing about seventy acres, *which were the premises in question.* It was admitted that the marriage between *Henry Wisner* and *Sarah Waters* took place; that he took and disposed of the property she conveyed to him, to the amount of 425*l.* That *Henry Wisner* died in the life-time of *Sarah*, insolvent, but did not secure to her the money arising from her estate as he covenanted to do; consequently, that a considerable sum was due to her after his death, and to her representatives after her death, from *Wisner's* estate, which can never be obtained, *unless the premises in question are made liable.* That *Sarah*, the widow of the said *Henry Wisner*, enjoyed the said house and farm in *Goshen*, during her widowhood, under and by virtue of the said marriage contract, and until her death, which happened in or about the month of *July*, 1801. It was also admitted, that *Henry Wisner*, deceased, in his life-time, to wit, on the 14th day of *February*, 1786, mortgaged

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the said house and farm to *William Beekman*, to secure payment, on or before the 14th day of *February*, 1787, of 387*l.* 13*s.* with lawful interest, *bona fide* due. That *William Beekman* on the 13th of *October*, 1782, for the consideration of 300*l.* (200*l.* whereof was then paid, and a bond given for the remaining 100*l.* payable on the death of the said *Sarah Wisner*,) sold and assigned the said mortgage and a bond which accompanied the same to the respondent, *John Stewart*, with all the money due and to grow due thereon. That a judgment at law was obtained against the said *Henry Wisner*, deceased, and thereupon a *fieri facias* and *venditioni exponas* were issued to the sheriff of the county of *Orange*, who, by virtue thereof, in the life-time of the said *Sarah*, the widow of the said *Henry Wisner*, among other things, sold the equity of redemption of the said mortgaged premises, subject to the said widow's estate therein, to *Henry Wisner*, junior. That *Henry Wisner*, junior, on the 19th day of *April*, 1791, conveyed, among other things, the right and interest he had purchased in the said premises, to *Polydore B. Wisner*, as a trustee, to enable him to sell and convey the same; and *Polydore B. Wisner*, on the 11th of *January*, 1793, conveyed the said equity of redemption in the said mortgaged premises to the defendant, *John Stewart*, in satisfaction of a book debt he had against *Henry Wisner*, the elder, then deceased. *Thus the defendant, as assignee of the mortgage and the purchaser of the equity of redemption, under a sale on an execution at law, claimed to be the legal and absolute owner of the house and farm in question. It was admitted that *Henry Wisner*, deceased, by will duly executed, devised the said house and farm to his two daughters *Elizabeth* and *Sarah*, in fee. That, since the death of the said *Henry Wisner*, and before the bill was filed, the said *Elizabeth* and *Sarah*, in due form of law, conveyed all their right and interest as such devisees in the said house and farm, to the complainant *Thomas Waters*, in fee. The bill was to redeem the house and farm, by paying to the re-

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spondent, *Stewart*, what he was entitled to receive as the assignee of the mortgage, that is to say, the sum he paid with interest; or, if he should be entitled to it, the whole amount of the mortgage-money and interest. This right of redemption was contended for before the Chancellor on two grounds; 1st. That the complainant, *Waters*, and the other children and heirs of *Sarah*, the wife of *Henry Wisner*, were creditors under the marriage contract; and that, in equity, that contract bound the premises in question to pay those demands, after paying the mortgage given to *Beekman*. 2dly. That an equity of redemption could not be seized and sold by virtue of an execution at law, and that consequently, *Thomas Waters*, having purchased and taken a conveyance from the devisees of the estate, had a right to redeem the mortgaged premises upon equitable principles, by paying the assignee of the mortgage what he was entitled to.

The Chancellor being of opinion against the complainants on both grounds, decreed that the bill should be dismissed with costs; and thus assigned the reasons on which he had pronounced.

Mr. *President*—This cause came before the court on a motion for the dissolution of an injunction, issued to restrain the defendant from obtaining possession at law of the premises in question. On that motion the whole ground of controversy was explored, and the counsel for the parties, discovering that a determination on it would involve a decision on the merits generally, argued it a second time, *as on a final hearing*. In doing this, they united in presenting, as a determining point between the parties, simply, whether an equity of redemption in lands mortgaged in
* 50 fee, is subject to a sale *as a *fieri facias?* To determine this question, the nature of the subject, and the course of the arguments of the counsel, lead me cursorily to trace the progress of the *English* jurisprudence, (as far as it has any bearing on this point,) from its departure from the common

law until the act of the 5th *Geo.* II. and the subsequent modifications it has received here. It is certainly a sound moral principle, that every description of property held by a debtor should be subject to the payment of his debts. The policy deduced from the feudal system, was, however, far from being in strict unison with this principle; and had so far blended itself with the *English* institutions, as generally to resist the infusion of those dictated by more just and liberal views. This detracted from the security and preservation of lands in the hands of those who held them, and their heirs; for, at common law, only goods and chattels, and the growing profits of land were, on a *levari facias*, or a *fieri facias*, liable for the satisfaction of debts. This strictness was somewhat retained by the statutes of *elegit*; for it appears to have been a reluctant departure from the more ancient doctrine, certainly not reconcilable to its general scope and object, and equally remote from the principle the framers of the statute appear to have been disposed to approach: for, instead of carrying the remedy the length which complete and effectual justice required, it subjected only half of the debtor's real estate to an extent, with a reversionary interest to him or his heirs, after the debt was satisfied from the profits of the lands. The inroad made on the common law principles, by giving the *elegit*, has, however, been protected by several successive statutes: thus *Blackstone*, in his *Commentaries*, enumerates, among the evils arising from the doctrines of uses, *the defrauding the creditor of his extent for debts.* He adds, to remedy these inconveniences, abundance of statutes were provided, which, among other things, made the land liable to be extended by the creditors of *cestui que use.* Among these, the statute of uses, and of frauds and perjuries, were most effective; and, after the passing of the latter statute, a *trust estate*, whether declared or resulting, was considered, in the language of *Blackstone*, "as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge *in equity*, which the

3 *Co.* 11. *Herbert's* case. 2 *Inst.* 394.

2 *Bl.* 332. cites *Use of the Law*, 153.

5 *Ed.* III. c. 6. 2 *Rich.* II. c. 23. 19 *Hen.* VII. c. 15. 27 *Hen.* VIII. c. 10. 29 *Car.* II. c. 3.

2 *Bl.* 337.

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other is subject to *in law*." "The trust may descend; be alienated; is liable to debts;* to executions on judgments, statutes, and recognisances, (by the express provision of the statute of frauds,) to forfeitures, to leases, and other encumbrances, nay, even to the curtesy of the husband, *as if it was an estate at law*." Thus, in the case of *Casborne* v. *Scarfe and Inglis*, Lord *Hardwicke* lays it down, that an equity of redemption cannot be considered as a mere right: but such an estate whereof there may be a seisin, and that the person entitled to it is considered as the *owner of the land;* that an actual possession, clothed with the receipt of rents and profits, is the highest instance of an equitable seisin; and that the mortgagee, as to the legal estate and inheritance, is merely *a trustee* for the mortgagor, until the equity of redemption is released or foreclosed. In the case of *Amhurst* v. *Dawling*, an advowson, appendant to a mortgaged manor, had, before that, been held in the nature of a *trust* for the benefit of the mortgagor: so, in the case of the *Attorney-General* v. *Hasketh et al.* in which the same doctrine had before been laid down; and it is in that case expressly declared by the Lord Keeper, *that the court which supports trusts, will prevent trusts from doing mischief.* The spirit of these cases has been recognised and enforced in the *British* courts of *common law.* In the case of *The King* v. *The Inhabitants of St. Michaels*, decided after our revolution, Lord *Mansfield* emphatically declares it to be "an affront to common sense, to say that the mortgagor is not the real owner." And whatever might have been the construction at an earlier day in those courts, in equity, the intent of the parties has been permitted to give a complexion to this kind of transaction, and to constitute it a naked security for the payment of money, without any of the substantial rights of ownership. It is merely a lien until it is foreclosed, or the possession acquired by the mortgagee: thus the mortgagor, until either of these events occur, is the beneficial owner; he takes the rents and profits without any account; he is a freeholder, qualified to vote

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1 *Atk.* 603. in 1737.

2 *Vern.* 401. in 1700.

2 *Vern.* 540. in 1706.

Doug. 610. 25 *Geo.* III.

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as such, and he is deemed the owner of a landed estate within the *English* settlement laws. The provision for admitting him to vote, is, indeed, by statute; *but it appears to me merely a declaration of the law, previous to the passing of the act, and introduced for greater caution. The case of *Lyster* v. *Dolland*, reported in 2 *Brown's Ch. Rep.* 478. and 1 *Vesey*, jun. 431. does not impugn the general doctrine; for in the report of that case in 1 *Vesey*, the Lord Chancellor admits, "*that an equity is extendible*, and the mortgagor is expressly let in to redeem, on the ground that the mortgagee had so mixed his own interest with that of the mortgagor, that they could not be distinguished." I take it, then, that an equity of redemption in *England* is an extendible interest, and that so is the property of *cestui que trust* in the hands of trustees. *Bunb.* 346. The solicitude of the holders of landed estates, to perpetuate them within families, combined with the genius of the *English* government, contributed to maintain the distinction between real and personal property, which obtained after the passing of the statute of *elegit:* but the collision between the landed and commercial interest being merely *local*, as confined to *Great Britain*, and not so extending to its colonies as to react by influencing its parliament, in which the landed interest of those colonies had neither a direct nor virtual representation, the same impediments did not present to the passing of the statute of *5 Geo.* II. c. 7. for the more easy recovery of debts in the colonies. This subjected real estate to a disposition, in like manner as personal, on execution, and a remedy was thereby given, coextensive with the property of the debtor, regardless of the distinction which

Doug. 455. *Eaton* v. *Jaques.*† * 52

2 *Laws N. Y.* 39.

† This case went on a principle of their remaining in a lessee, after an assignment by way of mortgage of all his right, title, &c. in the term, and after forfeiture, such a degree of interest as to prevent the lessor from suing the mortgagee as assignee of all the estate, &c. of the mortgagor. But in *Stone* v. *Ewer*, *Sitt. at West.* before *Kenyon*, *c.f. M. T.* 30 *Geo.* III. his Lordship declared he could not subscribe to the doctrine laid down in *Eaton* v. *Jaques*; and in *Westerdale* v. *Dale*, 7 *D. & E.* 306. it seems evident that his Lordship considers the mortgagee of a term for years, liable to the rent reserved.

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had been so sedulously preserved in *Great Britain*. This statute so far extended in practice in this state, while a colony, as to affect lands by sales on executions, issued on judgments obtained against the executors of debtors, on the principle, that the statute of 5 *Geo.* II. had, in its operation, *so far as respected the interest of creditors*, completely converted real into personal estate. It is certain, that sales of equities of redemption have been uninterruptedly made, from the time of passing that statute, until the legislature passed the statute of 19th *March*, 1787; and the same practice, as to such sales *has continued to prevail under the latter statute. This statute subjected every species of estate, comprehended in the very extensive description of "*lands, tenements, and real estate*," to be sold on execution, and is strictly compatible, in its most comprehensive construction, with the general provision, that both real and personal estate, in the hands of the heir or executor, (and whether the debt was contracted by specialty in which the heir was named, or otherwise,) shall be applied to the satisfaction of the debts of the ancestor, or testator. There is one objection which was strongly urged against giving effect to those sales here, and that is, that the purchaser could not take the effect of it at law. If this position was correct, I do not think it is so forcible as the counsel who urged it. A sale on execution is *not enforced peculiarly by the court under whose process it is made;* the evidence of the sale is furnished by the sheriff, and the purchaser elects the forum, to which he intends to resort, to give him the benefit of it. If any of the *fora* of the state are competent to give him the effect of his purchase, every intent of the sale is fully accomplished; and I know no legal or equitable principle that can repel this result. But if the mortgagor was possessed, at the time of the sale, the controversy must strictly be between the mortgagor and purchaser: no inconvenience can arise from compelling the former to yield his possession to the latter. Thus, in a recent case, it has been held in the K. B. in the case of *Bristow* v. *Pegg*, 1 *D.* & *E.* 758.

L. N. Y. Greenleaf's ed. 407. * 53

1 *Rev. Laws*, 388. sec. 1.

25 *Geo.* III.† if there is an existing title paramount the person who holds, he may avail himself of it by showing it, and it does not lie in the mouth of the *mortgagor* to allege its existence; for, notwithstanding a title might exist, by virtue of which the person *actually seised* might be ousted, it would seem strange that *his right of seisin* should pass by the sale, and the latent equitable interest which he had in the lands, should be retained by him. From these considerations; from the number of estates which depend on supporting sales of this nature; from the long practice which has obtained respecting them; and from the great inconvenience which would result from the doctrine, that however great the disproportion between the sum secured, and the value of the estate charged with it, the latter might be protected from being applied to the satisfaction of judgment creditors on executions, I think sales of this *kind ought to be sustained; and that, whether the mortgagor is considered *as the real owner*, or the mortgagee is considered as *his trustee*, an equity of redemption is within the purview of our statute, *and subject to sales on execution.* The complainants' bill must, therefore, be dismissed with costs.

† See *Hodsden* v. *Staple*, 2 *E.* 684. which seems to have shaken *Bristow* v. *Pegg*, at least in the *English* courts.

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Riggs, for the appellants. We admit the moral justice and policy of making every man's property liable to his debts, and we shall even concede that with us these principles have been carried further than in *England;* but notwithstanding this, the distinctions between legal and equitable estates, have in each been preserved, their boundaries equally marked out, and the *fora* by which they are to be approached kept invariably distinct. In equity, the mortgagor is considered as owner of the land; at law, the estate, on executing the mortgage, is in the mortgagee, and he may, unless restrained by his covenant, enter immediately. 1 *Pow. on Mort.* 105. 226. And though a mortgagor, left in possession, pays no rent,‡ *that* arises merely from the contract, the interest of the money being an equivalent. He is a mere tenant at sufferance to the mortgagee; for after for-

‡ 1 *Pow. on Mort.* 232.

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feiture, so completely is the legal estate vested in the mortgagee, that the mortgagor is not entitled to the common notice to quit, which must be given to a tenant at will. The idea of a constant practice to sell, under a *fieri facias*, equities of redemption, is a mistake; I never heard of but two instances; one was settled, the other is now in dispute. the maxim, therefore, of *communis error facit jus*, cannot apply. But errors merely acquiesced in, and never disputed, do not constitute the law.† Actions by and against executors and administrators, had been from the date of our revolution entertained in justices' courts; yet the first time the point was brought before the supreme court, they reversed the judgment below.‡ So under the act giving cognisance of plaints. Another instance is afforded by the corporation of *New-York*. They had for forty years been in the habit of creating penalties, and giving half to the informer. Suit upon suit had been brought, and recoveries had, yet their right to do this was overruled the instant it was attacked in the supreme court. All power of selling under executions at law, landed property, or any thing savouring of the realty, is by statute provision; and what the words of the statute do not cover, cannot be sold. Therefore, equities of redemption, *even of chattel interests, in terms of years, are not saleable under a *levari facias*, because the act has not the words "equitable interests." *Burden* v. *Kennedy*, 3 *Atk.* 738. *Lyster* v. *Dolland*, 3 *Bro. C. Rep.* 478. 1 *Vez.* jun. 431. *S. C.* will be found to this point, notwithstanding the chancellor's apprehension of its bearing the contrary way. An equity of redemption is not known at law; it is a mere creature of chancery, and cannot be contemplated, therefore, as an object of sale, by a court which does not acknowledge its existence. What is not, according to legal contemplation, in possession, but rests merely in right, cannot be taken in execution. *Choses in action*, therefore, cannot be seized on. *Francis* v. *Nash*, *Cas. temp. Hardwicke*, 53. *Impey's Sheriff*, 157. On the same principle, goods pawned demised, or letten for years, are not liable to a *fi. fa.* *Im-*

† In *Lench* v. *Pargiter*, the practice under the lords' act had been one way for thirty years, but was altered the first time the statute came under consideration of the court. *Doug.* 68.

‡ *Way* v. *Carey*, 1 *N. Y. T. R.* 191.

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pey's Sheriff, 158. *Audley* v. *Halsey*,† *Cro. Car.* 148. *Kitchen*, 226. To make an equity of redemption saleable at common law, will defeat the ends of distributive justice. A debt due on a book account, note, or on a bond, is as much a debt in conscience as one on a judgment; but if the decision appealed from be confirmed, one judgment creditor may run away with even the equitable estate, and exclude all the other *bona fide*, though simple contract creditors, from every farthing. It has been the policy of our courts to extend equitable assets, because they are appropriated in payment of debts *pari passu*. For this purpose an equity of redemption is considered as equitable assets, not for the purpose of rendering it inapplicable, but that it may be equally distributed. 2 *Atk.* 290.‡ 1 *Vern.* 410, 411, 412.§ *Vern.* 61.** 3 *P. Wms.* 341. Sir *Charles Coxe's* case. 3 *Keb.* 307. *Amb.* 308.†† 2 *Freeman*, 115. 3 *Wooddeson*, 487. It is so perfectly an equitable interest, that in an action against the heir of a mortgagor, he can plead *rien per descent*, though entitled to an equity of redemption. 1 *Pow. on Mort.* 369. In all cases where land can be taken for debts, the debt must be a *lien* on the land, and in case of the death of the judgment debtor, after an intermediate alienation, a *scire facias* *goes against the tertenant. But in the case of a mortgage, then a judgment, then the death of the mortgagor, to a *scire facias* against the tertenant, he may show title in the mortgagee; which demonstrates the legal estate to be out of the heirs of the mortgagor. The saleability of an equity of redemption is not denied, but convenience demands it should be in chancery. A mortgage may have been for $10,000, and only one thousand due; the registry may show the full amount of the original sum lent to be still owing, and the equity be purchased, under that presumption, for a trifle. The reverse may be the case; double the sum apparent may, from accruing interest, be due, and the equity bought for a large sum, when in fact not worth a cent. Each of these cases may produce a bill in

† The action there was trover for goods, the question was, whether, after an extent sued out before a commission of bankruptcy against the consignor owner, though the liberate was afterwards, should prevail against a sale by the commissioners? Held that it should.

‡ *Plunket* v. *Benson.*

§ *Cole* v. *Warden. Plucknet* v. *Kirk.* The distinction between mortgages in fee and for years, was in the three cases above, taken and allowed as to the nature of the interest left in the mortgagor. In mortgages for years, the reversion being a legal estate in the mortgagor, attracts the equity of redemption, and gives it the quality of the reversionary interest. In such a case, therefore, the equity of redemption is legal assets. But if the mortgage be in fee, and there is not any legal interest left in the mortgagor, the equity of redemption is equitable assets.

** *Sauley* v. *Gower*

†† *Hartwell* v. *Chitters.*

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chancery. The mode of coming at equities of redemption is easy, without any violation of principles, preserving, at the same time, the true distinction between equitable and legal estates, and the jurisdictions by which they are cognisable. Let the creditor sue to judgment, then, by the analogy adopted in chancery, as the judgment would at law attach on the legal estate, its operation in equity will affect the equitable interest, and an encumbrance be created, which on execution sued out,† will entitle the judgment creditor to his bill against the mortgagee to redeem. 3 *Atk.* 200.‡ 1 *Pow. on Mort.* 349. 359, 360. 2 *Ch. Ca.* 170.§ This brings the whole matter before the court, which alone can give full relief; the account on the mortgage is entered into; the sum due upon it discharged, and the balance paid over. The statute¶ by which trust estates are made liable to debts, will not warrant the decree complained of. That act relates only to fraudulent and covinous trusts, in which the *cestui que use* has the sole beneficial interest; it is a part of the statute of frauds, and therefore our act declares that** the land shall, under the sale, be held discharged of all such encumbrances. This would defeat the mortgage. The *English* authorities confine their law of frauds and perjuries, of which ours is a copy, to these trusts, and do not extend them to equities of redemption. 2 *Saund.* 203. *Hard.* 467.†† 1 *Black. Rep.* 145.‡‡ Our act, subjecting lands to debts, makes a provision in case the purchaser should be evicted: now, it is impossible for a man to be evicted from an equity of redemption; and if he was by the mortgagee, he would be entitled to *recompense from the judgment creditor himself. This would make the remedy recur to the same point from whence it set out. In the case mentioned, there could be no *legal* seisin of the interest to be sold, and the form of the execution is of lands "whereof seised.¶¶" All that can be obtained against a mortgaged estate by a judgment at law, is an equitable lien; for a judgment creditor cannot tack. 1 *Pow. on Mort.* 526. to 529. After sale of an

† That is, where the mortgage is of a leasehold or chattel interest.

‡ *Shirley* v. *Watts.*

§ *Griswold* v. *Marsham.*

¶ 1 *Rev. Laws*, 66.

** 1 *Rev. Laws*, 68.

†† *Pawlet* v. *Attorney General.*

‡‡ *Burgess* v. *Wheate.*

1 *Rev. Laws*, 391.

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¶¶ 1 *Rev. Laws*, 390 *S.* 9.

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equity of redemption by the sheriff, he could not give possession; ejectment would not lie upon his deed, and chancery must be at last resorted to, to give effect to the sale.

Hoffman and *Hamilton*, contra. As the lands and real estate of a debtor may be taken in execution, under our statute,† the words being "all and singular the lands, tenements, and real estate," the only question is, who is the owner of lands or real estate mortgaged? If the mortgagor was out of possession, we concede the sale would not be valid; and *that* was the circumstance of the case from *Atkyns*;‡ the termor had parted with the possession. Till the decision in *Brown* and *Vesey*, jun. the saleability of an equity of redemption on an execution was never doubted; and, in favour of its being vendible under a *fi. fa.* the opinion of Mr. *Powell*§ is a very strong authority. There can be no reason for excluding it from this incident annexed at law to real estates, when it partakes of every other quality which characterizes land. The mortgagee is proprietor of the mortgaged premises only so as to protect his security; against all the world but him, the mortgagor is the real owner. He may when in possession levy a fine,¶ or suffer a common recovery,†† and must *therefore have the legal freehold in him. His fine bars all rights but that

† 1 *Rev. Laws*, 388.

‡ That, however, was not the point on which the decision turned. In *King* v. *Marissal*, 3 *Atk.* 192. it is to be inferred that the mortgagee was in possession; but in *Shirley* v. *Watts*, *ib.* 200. the contrary is rather to be supposed.

§ *Pow. on Mort.* 389. is the only place where I can discover any law on this point; in my edition, which is of 1799, no opinion is given, and the case cited is contra the extendibility.

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¶ This he may do, without having any interest in the land, and in such a case the fine operates not on the land, but against the parties, by way of estoppel. Anciently, the cognisee was put, on a purchase made, into possession before the fine was levied, and the vendor, by way of security, levied the fine afterwards. 3 *Bac. Abr. n.* ed. 194. Under the words of our statute, a fine passed by a person out of possession, will be as effectual against his rights and the rights of his privies, as if he was in possession; for it will be a perpetual estoppel, unless the persons claiming can bring themselves within some of the exceptions. On this principle, the case of *Weale* v. *Lower*, *Pollex.* 54. was determined. Fines *sur concessit*, and cognisance *de droit tantum*, are for the purpose of passing interests where the cognisor has not a freehold in possession.

†† Either to be a tenant to the *præcipe*, or to make one, it is necessary that the tenant, in one case, or the grantor in the other, should have the legal freehold in possession. *Qy.* How would a mortgagor, after a mortgage in fee, be considered? The argument, as to a mortgagor suffering a recovery, is as good for the mortgagee. See *Palm.* 135. *Cro. Jac.* 595.

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of the mortgagee, who is not affected† by five years' non-claim; and need not make an entry. 1 *Pow. on Mort.* 220. In consequence of this ownership of the mortgagor, his interest in the equity of redemption has all the properties of a legal estate. It passes by a general devise of "all" my real and personal estate. 1 *Pow. on Mort.* 353. It descends; the personal estate is first liable for debts; it may be entailed; it follows the custom in borough *English.* 1 *Pow.* 346. Nay, a mortgagor gains at law a parish settlement in consequence of his legal ownership.‡ *Doug.* 632.§ Lord *Mansfield* in that case says, "it would be an affront to common sense to say the mortgagor is not the real owner." But further, a mortgagor is not accountable to a mortgagee for profits, even after the mortgage is forfeited. A mortgage in fee revokes a devise only *pro tanto.*¶ The right of presenting belongs to the mortgagor of lands to which an advowson is appendant.†† Our statute book recognises the mortgagor as the freeholder: he is declared to be qualified to vote at elections in virtue of the freehold‡‡ in him. The estate of the mortgagee§§ has none of these qualities. He has only a qualified right sufficient to protect his debt. To make his title efficient, he must foreclose; but though he do this, and enter, he is considered but as bailiff to the mortgagor, and liable to account.¶¶ If

† The generality of this position may, perhaps, be doubted. A fine does not affect any estate which it does not devest, displace, or turn to a right. As between the parties and their privies, the intent will control the operation. *Freeman* v. *Barnes*, 1 *Sid.* 460. The mere circumstance of there being an existing mortgage, would not, it may be argued, prevent the effect of a fine in barring the mortgagee. If the mortgage be by demise, and the interest regularly paid by the person in possession, a fine and non-claim would not, I presume, be a bar. *Fermor's* case, 3 *Rep.* But should the estate be forfeited, and interest not paid, then it may be a question whether a sale by a mortgagor in possession with a fine levied, would not, after five years, bar the mortgagee. *Suffyn's* case, 5 *Rep.* 123. The reasoning in favour of such a result may possibly be enforced by the case of *Dighton* v. *Grenville*, *Cruise on Fines*, 246. where the decision of the *House of Lords* is given, though in none of the *Reports* of this case has it been noticed. A mortgage in fee may possibly be distinguished; for the mortgagee may, perhaps, there say, *partes finis nihil habuerunt.*

‡ It perhaps depends rather on his possession; for if the mortgagee be in possession, he will gain the settlement. Per Ld. *Mansfield*, in the case cited.

§ *The King* v. *St. Michaels.*

¶ This is in equity; at law it is contra, and on the very principle that the legal estate is parted with by the testator during his life. See 1 *Vern.* 342.

†† This is true in equity, but not at law, for the mortgagee having the legal estate, has the right of presentation; and the mortgagor, to prevent its exercise, must apply to equity. *Galley* v. *Selby*, *Com. Rep.* 343. *Croft* v. *Powel*, *ibid.* 609.

‡‡ While in occupation. 1 *Rev. Laws*, 274. When he parts with that, he loses his right.

§§ He has, when in possession, a right to vote, *ibid.* and note the diversity of expression.

¶¶ If the decree of foreclosure be opened.

he even assigns his interest, he still continues liable for the waste and depredation of his assignee. A general devise by him of all his estate, will not, even after foreclosure *and possession, pass the lands mortgaged.† It goes to his executors as personalty, and not to his heirs, as the realty would. 1 *Pow. on Mort.* 438. *et seq.* He has but a chattel interest. Where then can the fee be, if not in the mortgagor? This is further established, because a mortgage will pass by a will not attested according to the statute. 1 *Pow.* 455. The interest of the mortgagee is intrinsically nothing more than what arises from the contract of borrowing, and therefore, when the debt is paid, there needs no reconveyance of the estate to the mortgagor.‡ This shows the legal estate remains in him, by virtue of the equity of redemption, and is necessarily liable for his debts by sale at common law under an execution. If this would destroy the mortgagee's security, then it could not be valid; but it is not so, the land remains subject to the mortgage. It is not an answer to this reasoning to say that our positions rest on chancery decisions. In equity, and at law, the rules relating to landed property are the same. 1 *D. & E.* 762. per *Buller*, J.§ Courts of law have latterly been disposed to acknowledge equitable principles, to avoid sending creditors there. On this account the assignor of a bond, though it be a *chose in action*, cannot, after assignment, release the obligation; nor can even the obligor, after notice, discharge it. The inconveniences of selling an equity of redemption on account of an existing mortgage, are imaginary. They are no greater than in a sale on a third judgment, where there have been two previous ones for the penalties of bonds. The purchaser takes subject to the encumbrance. An equity of redemption is equitable assets¶ only in a certain sense: among those

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† After foreclosure, if the devise treat the mortgaged premises as land, they will pass by words applicable to real estate. *Garret* v. *Evers*, *Mosely*, 364. So if the will be properly executed according to the statute, "all my estate." *Pow.* 448. See 1 *Pow.* c. 12. See 2 *Pow.* 692. *et seq.*

‡ See *Harrison* v. *Owen*, 1 *Atk.* 520. that to revest the estate, there must be a deed In *Turner* v. *Richmond*, 2 *Vern.* 81. a mortgage paid off was, as there was no reconveyance, held to protect a judgment creditor against a second mortgagee. This must have been on the principle of the legal estate being in the mortgagee.

§ *Goodtitle* v. *Morgan.*

¶ The cases on this point in the *English* books, seem to be involved in some degree of perplexity. In Sir *Charles Cox's* case, 3 *P. Wms.* 341. and in *Hartwell* v. *Chiters*, decided upon the authority of that case, the equity of redemption of a mortgaged term, was held to be equitable assets. It appears, however, that it is not: for, as the executor, had there not been a mortgage, would have had the term to apply in a course of administration, it would

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who have no lien on the land; such as on a bill to redeem *by general creditors, or in a trust for payment of debts; but not against a judgment creditor, who by his very judgment obtains a lien which will entitle him to redeem. 1 *Pow. on Mort.* 348. To force him to this alone is a grievance for which our statute meant to afford redress, by permitting him to sell to a person who may be able to redeem. A mortgage contract may be for ten years, with a covenant that the mortgagee shall not be compellable to receive it before; must a creditor, or a judgment recovered immediately after execution of the deeds, wait ten years? The simple mode is to sell at once under a *fi. fa.* for chancery cannot order a redemption. The argument against selling an equity of redemption because it is equitable assets, is equally forcible against selling trusts; for by the statute of uses they are made liable to be sold by the sheriff. So before the passing that act an heir might have pleaded *riens per descent*, though a covinous trust was existing; yet, since that law has been enacted, such a trust is saleable under execution. Though ejectment on a sheriff's deed for

seem the equity of redemption would go to him also, on the same principle as it is held to pass in cases of real property, to him who would be entitled to the land. *Hawkins* v. *Lawse*, 1 *Leon.* 155. and the cases cited by Mr. *Cox*, in his note, 2 *P. Wms.* 344. Whether the equity of redemption in real estate, shall be legal or equitable assets, may perhaps depend on another question; that is, whether the mortgage be in fee; or by way of demise for a term of years? In the former case it has been conceded, that it is equitable, because the mortgagor has parted with all his legal estate, and the pure equity which determines the nature of the assets, is all that remains in him. In the latter, as he retains the legal reversion after the term created by the demise, that interest gives the quality to the assets, rendering it legal, and a judgment of *quando acciderint* may be had against it. *Massam* v. *Harding*, 2 *Atk.* 291. *Bunb.* 339. *Fortrey* v. *Fortrey*, 2 *Vern.* 134. If the redemption be equitable assets, it will not, it has been held, be affected by a judgment at law. In the second resolution, in *Deg* v. *Deg*, 2 *P. Wms.* 416. it is said, "the premises devised being mortgaged in fee by the testator, and he having nothing but an equity of redemption, could be only equitable assets, and consequently must go among all the creditors equally; forasmuch as a debt by judgment and a debt by simple contract are, in conscience, equal." But this position is a little shaken in the decision in *Sharpe* v. *The Earl of Scarborough*, 4 *Ves.* jun. 538. It was there ruled, that an equity of redemption is not equitable assets, at least against judgment creditors who have a right to redeem, and that against such the court would never marshal the assets. If this decision went on a principle of rendering equitable estates liable in equity to the same liens as legal estates are at law, it seems to overturn the maxim of the court, that in conscience all debts are equal. If, however, the mortgage was by way of demise, (and the contrary does not appear,) then the judgment of the Chancellor will not oppugn those of his predecessors. But on these points the learned in the law must make their own conclusions.

an equity of redemption could not lie against the mortgagee, yet a mortgagor would never, in a court of law, be allowed to set up the title of his mortgagee against the purchaser; and against the mortgagee there would be no claim, because the purchase would be subject to his demand. If a mortgagor may sell, why may not a sheriff? Whatever the debtor can dispose of, his creditor can sell. The remedy given in case of eviction, is where the debtor *had no * 61
title, and the party purchasing is evicted by a prior encumbrance. But it is under *that* we contend the purchase is made. The words of our act are, all lands and "real estate." *Rev. Laws*, vol. 1. 388. The form of the execution given is against real estate whereof "seised." There is nothing to restrain the word to legal seisins. The word seisin has an equitable interpretation. 2 *Bro. C. Rep.* 268. 272. There may be an equitable seisin of an equity of redemption, for it admits of a tenancy by the curtesy, and to create such a tenancy there must be a seisin of the wife. The case cited from *Atkyns*, and 1 *Pow. on Mort.* 352, 353. shows this. We have a complete union of legal and equitable interests; we had the first, and we bought the latter. But whatever may be the reasonings from the common law and *English* authorities, we rest on the words of our statute, which subjects to sale under a *fi. fa.* "all real estates," without confining the operation of the words to such as are legal only. The *English* act of parliament furnishes no kind of reasoning against this, it makes land only extendible, and not saleable. Yet under that very law, lands on which there has been an extent upon a statute merchant, may be extended upon an *elegit*.† *Vin. Abr.* tit. *Execution*, *M.* 1. and the notes. So if a reversioner upon a lease for years acknowledge a statute, &c. the rent and reversion will both be extendible.‡ *Bac. Abr.* tit. *Execution*, *B.* page 339. 2 *Roll. Abr.* 472. *Co. Litt.* 135. A rent-charge§ is also extendible. 2 *Show.* 85. *Comb.* 391. Our policy makes land

† The case was, a conusee of a statute was put into possession, under the extent, his creditor sued out an *elegit* against the land while in extent, as well he might.

‡ The reversion being extendible, the rent will go with it as its incident.

§ It savours of the realty, and land in the statute is held to include any hereditament in the land, and as the conusee has, by the words of the statute, an estate of freehold in the premises, he may distrain and avow for the rent.

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more liable than the *English* code. On a deficiency of personal assets, the court of probates can order a sale of the real.† In the very case of goods pawned, the judgment creditor obtains an interest; 3 *Bulst.* 17.‡ and though these cannot be taken in execution, that arises only because possession is proof of property, which is not the case with land. It is said we cannot have the benefit of our execution, because in the case put, a *sci. fa.* would not lie against the tertenant. This reasoning would equally prevent selling where the legal estate is in the trustee; yet it was never known to prevail against an execution concerning *uses.¶ A vendee of partnership stock taken in execution for a debt of one of the firm, must, before he can have complete enjoyment of his purchase, discharge the *lien* of the partner; yet this has never been urged as a reason against such a sale. The same principle applies to equities of redemption. Our lands do not produce rents, and therefore convenience dictated our law to sell the soil, because possession under an *elegit* would never pay the debt. The act of the legislature directs the realty to be sold in the same manner as personale state.

† 1 *Rev. Laws*, 323.

‡ "If a man doth gage goods in pledge for 40*l.* borrowed upon them, afterwards the debtor is condemned in 100*l.* debts to another, these goods shall not be taken in execution until the 40*l.* be paid; for the *creditor* hath an interest in them." The 40*l.* creditor.

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¶ 1 *Rev. Laws*, 66.

Van Vechten and *Benson*, in reply. The arguments opposed to us are grounded on an application of equitable rights to legal estates. They tend to confound all distinctions between equitable and legal jurisdictions. They subvert established forms which have ever been held the landmarks of property. The tenancy by the curtesy spoken of in the case from *Atkyns*,** cited in 1 *Pow. on Mort.* 353. was an equitable tenancy, founded on an equitable seisin, and therefore no authority to prove a legal right on an equitable estate. Only *legal* interests are liable to execution, because the law gives recourse against that only, to which the officer selling can give a legal title. Of lands articled, a man may be tenant by the curtesy. 2 *Vern.* 536.†† But can his interest in such be taken on an execution? Ejectment will not lie for an equity of redemption; chancery must give effect to the purchase; therefore on a *fi. fa.* it cannot be taken, legal

** *Casborne* v. *Scarfe* and *Inglis*, 1 *Atk.* 603.

†† *Sweetapple* v. *Bindon.*

rights being always accompanied by legal remedies. The properties of an equity of redemption which it has analogous to an estate at law, such as being descendible, devisable, &c. can be availed of only before the chancellor; therefore, the same analogy would say an equity of redemption can be sold only by application to him. But though the equitable qualifications of property may be similar to those of correspondent interests at law, that is only the result of the principle of *equitas sequitur legem*. Not that they are objects of legal cognisance. Lands articled descend; a contract partly executed may be availed of in chancery, but not at law, and the interests acquired under neither can be liable to a sale by the sheriff. In the cases of trust made saleable by the statute, no beneficial interest of a third person intervenes, such as the mortgagee has at law. The necessity of a statute† provision to make such estates liable to execution, shows that the words of the law subjecting real estates *to execution could not have been intended to extend to equitable seisins, for then the other statute would have been unnecessary. The right to vote and the right of settlement, which may be exercised and gained by a mortgagor, depend not on his freehold, but on his possession, and when he loses *that*, he loses his right.‡ Did they rest on his freehold interest, they would be the same, whether in or out of possession; and the act bestowing the right of suffrage, was passed only because without it, even by his possession, as he had no freehold, it would not be conferred. Upon the same principle rests his power of levying a fine; when out of possession, he cannot,§ 1 *Pow. on Mort.* 220.; but after a mortgage in fee, can he make a tenant to the *præcipe*, for the purpose of suffering a common recovery? All his rights depend on his possession; therefore he, like a disseisor, may bring trespass. The reason why partnership stock may be sold under an execution against one of the firm, is, that the vendee may enter into possession with his co-tenant. This cannot be done on an equity of redemption. That a reconveyance of the mortgaged premises

† Act concerning uses.

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‡ *Vide ante*, p. 57. note ‡‡.

§ *Ante*, p. 57. note ¶.

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is unnecessary, is true only in certain cases. If the mortgagor remain in possession and satisfy the debt when due, in any action, by the mortgagee, he would be allowed to show performance of the condition; and if the mortgage had been given up or cancelled, a jury would, in all such cases, be directed to presume a reconveyance. But if the mortgage is forfeited, and the estate become absolute in the mortgagee, then we say a reconveyance in strictness is necessary.† In case of an assignment of mortgaged premises, the mortgagee is liable only when, after a forfeiture, and before foreclosure, he assigns *absolutely*. Not because the freehold is not in him, but because he has exceeded his equitable authority, equity will make him responsible; his right being *there* subject to redemption. That specialty creditors have in equity any preference is a mistake, for, unless the judgment creditor first removes the mortgage, he comes in *pari passu*.‡ When he gains a preference, it is not on the foot of his equitable *lien*, but because, having discharged the legal encumbrance, he stands on his legal rights, and is in some degree a purchaser. 3 *Atk.* 293. 1 *Pow. on Mort.* 369 to 374. The argument, therefore, that the present decree tends to defeat equitable distribution, and take away equitable assets, remains *totally unanswered. Chancery requires a judgment creditor to sue out execution, before it will allow him to redeem a mortgaged term, only from the analogy which it constantly preserves to legal principles. Because at law, a chattel interest, like a term, is bound only from delivery of the writ. *Shirley* v. *Watts*, 2 *Atk.* 200. 1 *Pow. on Mort.* 349. But at law even this does not affect it. *Burden* v. *Kennedy*, 3 *Atk.* 739. In *Plunket* v. *Pierson*, 2 *Atk.* 292. the Lord Chancellor asked the bar whether an equity of redemption had ever been held liable to an execution by a bond creditor, and the unanimous answer was in the negative. In case of a mortgage in fee, the judgment creditors must give notice to the mortgagee, and request him to receive his money. If he receive it, the mortgage being removed, execution may issue; if he refuse, the cre-

† *Ante*, p. 58. note ‡.

‡ *Ante*, p. 59. note ¶.

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ditors acquire a *lien* on the premises, not by virtue of their judgment, but of the notice. 1 *Pow. on Mort.* 359, 360. *Greswold* v. *Marsham*, 2 *Ch. Cas.* 170. The words of the statute do not say equitable interests; and this is the express ground of the decision in *Lyster* v. *Dolland*, because acts of parliament, and acts of our legislature, apply only to matters of law, unless their extent be declared. Even the statutes of bankrupts do not affect an equity of redemption;† for, after the conveyance of the bankrupt's estate by the commissioners to his assignees, he still may redeem. If an execution will attach on it, whether the mortgagor be in possession or out of possession, is immaterial; and yet it is conceded if the latter be the case, it cannot be touched. But allowing him in possession, a sale by the sheriff could convey no title to be enforced at law; for in an ejectment against the mortgagor, as he would be no party to the deed under which the plaintiff would claim, he could not be estopped from showing a paramount title in the mortgagee; and in ejectment you must recover by the strength of your own, not the weakness of your adversary's title. A sale by the mortgagor of his *interest* in the redemption, for it is not an *estate*, is merely in the nature of a contract to be perfected in equity. We therefore contend the sale was void in itself, for so completely is the legal estate in the mortgagee, that he has a right to distrain for rent arrear, *Moss* v. *Gallimore*, *Doug.* 279. and this even if due on a lease made prior to the mortgage. In this very case, too, the interest of the mortgagor is in a legal sense reduced even below that of a tenant at will.

† This is a mistake. Even under the *English* statute, which is not so full as our act of congress, an equity of redemption passes by the commissioners' assignment. *Vandenunker* v. *Desbrough*, 2 *Vern.* 96. See *Bank. Act*, sec. 12.

*Spencer, J. Two questions have been raised for the determination of the court: 1. Whether the appellants, who are the heirs of *Sarah*, who was the wife of *Henry Wisner*, were creditors under the marriage contract, so that, in equity, that contract bound the premises in question to pay those demands, after paying the mortgage given to *Beekman*? 2. Whether an equity of redemption could be seized * 65

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and sold by virtue of an execution at law? It will not be expected, that any opinion will be pronounced on the first question. It appears not to have been insisted on in the court of chancery; and although the appellants' counsel would have had a right to argue it in this court, still they have not attempted it. Of course it will, as respects myself, be laid out of the case. The decision of the second question will require an attentive consideration of our own municipal laws, with such aid in the construction of them, as we may draw by analogical reasoning from the *British* authorities; for I take it to be well settled, that in *England* there cannot be a sale of an equity of redemption upon a mortgage for a term of years. It perhaps may admit of doubt, whether an *elegit* or *levari facias* cannot there be served and executed upon land mortgaged in fee, whilst the mortgagor is in possession, and when his right consists of an equity of redemption only. That it was the uniform practice, under the colonial government, to sell under a *fi. fa.* all kinds of interests which the debtor had in lands, including equities of redemption, has been admitted. That this practice continued until the year 1787, has been also admitted. And though the practice cannot legalize a procedure unauthorized or forbidden by the law, yet, in cases admitting of doubt, it may, and ought to be regarded, in expounding statutory provisions, in relation to the same subject. By the statute of the 19th of *March*, 1787, it is enacted, "that all and singular the lands, tenements, and *real estate*, of every debtor shall be, and hereby are, made liable to be sold on execution," &c. This statute was re-enacted among the revised laws, in 1801. The extent and legal operation of the term *real estate*, will, in a great measure, decide the question. Courts of equity and courts of law undoubtedly regard the rights of a mortgagor and mortgagee, in a different manner. In the former, the land is considered as a pledge for the debt secured, and the mortgagor is considered the real owner; in the latter, the

* 66 legal estate, to some *purposes, is considered to be in the

mortgagee, from the moment of the execution of the mortgage, liable to be defeated by the performance of the condition, to wit, the payment of the money. In other respects, the courts of law follow the notions of a court of equity, and consider the mortgagee as holding the mortgage as a mere security for the money due. Thus it is, that at law, on the death of the mortgagee, the money due is considered as personal assets in the hands of executors or administrators. So, too, on the death of the mortgagor, his right to the mortgaged property, if he originally had a fee, and the mortgage was in fee, will descend to his heirs, and not to his personal representatives. An equity of redemption may also be entailed; whereas, if it was considered a chattel, it could not be, nor could it, if considered as a mere right. By a devise of all lands, tenements, and hereditaments, a mortgage in fee will not pass, unless the equity of redemption be foreclosed. Again, a husband may be tenant by the curtesy of an equity of redemption. To perfect this right, four things are necessary; *marriage*, *issue*, *death of the* wife, and seisin in *fact*. And, as to the latter requisite, it is laid down, that an equity of redemption was not to be considered as a mere right only, but must be taken to be such an estate whereof there might be a seisin. From all these considerations, it appears to me, that a mortgagor's right in an equity of redemption, is to be considered as comprehended within the broad expression of "real estate." I am the more confirmed in this opinion, from the general and almost universal idea and practice which has prevailed for a series of years, as well as from the legislative declaration, that a mortgagor in possession is a freeholder, within the meaning of the constitution, and as such entitled to a vote. It has, however, been said by the appellants' counsel, that the form of the execution requires a legal *seisin*, and that a mortgagor cannot be legally *seised*. This exception has already, in some measure, been considered. There are two answers to it: First, The form of the execution ought not to control the declared in-

2 *Burr.* 978.

1 *Atk.* 605.

Ibid 606.

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tent of the legislature, in rendering every species of real *estate* liable to sale; and on no sound construction can this exposition be admitted. Second. When a statute speaks of a *seisin*, an equitable seisin may be as well intended as a legal one; and the term is applicable to both. I can, therefore, *perceive no substantial objection to the sale of an equity of redemption, under an execution at law. Difficulties have been started, in relation to the provision, giving remedy to purchasers evicted for want of title in the person against whom the execution issued; and it is said, that the purchaser can immediately have this remedy, where an equity of redemption only has been sold. If this position was well founded, it would only prove that the legislature had not foreseen all the cases which might occur under that provision; but it certainly proves nothing as to the right to sell an equity of redemption. I do not, however, perceive the difficulties which have been pointed out, in the same light the appellants' counsel have. The authority given to the supreme court, after suing out the original, and stating the grievance, is, to hear the complaint, and do justice to the parties. Surely it would be attended with no difficulty to decide, whether the equity of redemption sold, was encumbered beyond the amount stated, at the time of the sale; or, whether the purchaser was, in judgment of law, evicted of the equity of redemption he had purchased. Arguments *ab inconvenienti* have been suggested: there can scarcely exist a case, however well settled, where such arguments cannot he urged; they prove nothing, and are to be listened to only in very doubtful cases. In the present case, there would be no more difficulty nor inconvenience than exists every day, where there are several judgments, and the senior judgment creditor is disinclined to a sale. On the whole, I am for affirming the chancellor's decree: but as the present question has never before occurred in our courts, except in one instance, where no decision was made, I do not think that it would be dis-

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treet to impose a mulct. The respondent ought to have his costs only.

KENT, J. The right of redemption was contended for in the court below, and again in this court, on two grounds: 1st. That the marriage contract bound in equity the premises in question, to pay the money that *Henry Wisner* had covenanted to pay; and that the same belonged to the appellant and the other children of *Sarah Waters*, who were creditors under that contract. 2dly. That an equity of redemption cannot be seized and sold by virtue of an execution at law; and, consequently, that the same still exists in the appellant *Waters*, as a purchaser under the devisees of *Wisner*. I do not *perceive that there is any basis for the first doctrine. The land in question had no connexion whatever with the subject matter of the contract. There is no instance where an equitable lien has been carried to such an extent. The consideration of the contract did not arise from the land; and there is no equity that this particular land should stand charged with the fulfilment of the contract, when there was no agreement to that effect, and especially as against a creditor or a purchaser, without notice of the contract. The only real question then in this case is, whether an equity of redemption can be sold under an execution at law? This is a point of importance and difficulty; and although I cannot arrive at any conclusion altogether free from embarrassment, I am inclined to the opinion, that, under the act of *our* legislature, an equity of redemption can be sold at law; and, consequently, that the decree is correct, and ought to be affirmed. I admit, that under the *English* law, an equity of redemption cannot be sold by process at law; and yet their decisions have approached pretty nearly to the same thing. According to strict technical form and language, a mortgage in fee is, at law, a conveyance of the estate, and differs from an absolute sale only in respect to the equity of redemption, which is a mere equitable interest. As far as concerns the

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rights of the mortgagee, these strict formal ideas are fully enforced. Hence a mortgagor in possession is held to be like a tenant at will: he receives the rent by a tacit agreement; but the legal title to the rent is in the mortgagee, who may put himself in possession of it, and turn out the mortgagor whenever he pleases. The mortgagor, in such a case, would not be entitled even to a notice to quit, nor to reap the emblements as other tenants at will are, because all are liable to the debt. But when the mortgagee's rights are not in question, a mortgagor in possession, and before foreclosure, is a totally distinct character. He is regarded as the owner of the land, and the mortgage is treated as a mere encumbrance. He may levy a fine, and thereby bar all the world, except the mortgagee, who is exempted from its operation by the nature of the contract. He may suffer a common recovery, or otherwise aliene the land. It descends to his heirs as real estate. It is devisable as such. These are all marks of ownership, and go to show that "a mortgage, until foreclosure, is now considered as a *personal engagement only, in which the land is merely a pledge for the money, and remains in the mortgagor to every purpose, except that of securing the loan." It has accordingly been frequently observed by the judges in the court of K. B. that a mortgagee, notwithstanding the form of the instrument, has but a chattel interest, and the mortgage is only a security; that it was an affront to common sense to say the mortgagor is not the real owner; that the law recognises his interest, and has a right to the possession till the mortgagee brings his ejectment; that neither courts of law nor equity lose sight of what the parties intended, and will not look to the mere form of the conveyance, but will consider what the parties really meant by it; that the mortgagor in possession is owner to all the world, and the estate of the mortgagee a mere chattel interest, the same as the money due by the mortgage; that it accordingly goes to his executors, and is devisable in the same loose manner as other chattels; that the assignment of the debt, or even for-

Cro. Jac. 659. *Keech* v. *Hall*, *Doug.* 21. *Moss* v. *Gallimore*, *Doug.* 279.

1 *Vent.* 82. *Pow. on Mort.* 75, 76. 113. 126. 3 *D. & E.* 88 to 98.

Pow. on Mort. 170.

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Doug. 632. by *D.* Ld. *Mansfield*, *Rex* v. *St. Michael.* 1 *East*, 293. 1 *H. Black.* 117. 2 *Burr.* 978, 979. *Eaton* v. *Jaques*, *Doug.* 455.

giving it, and that too by *parol*, draws the land after it, as a consequence. These different and apparently contradictory lights in which the subject is viewed, arise from this circumstance—that, in the one case, the courts speak of the mortgage in reference to the rights of the mortgagee; and, in the other case, as it respects all the world, except the mortgagee. In equity, the mortgagor has been uniformly regarded as the legal owner; and the courts of law have latterly, in many respects, adopted the more rational ideas of chancery on this subject. If the mortgagor is to be deemed the owner of the land, as respects his own acts, and as respects the world, subject only to the *lien* of the mortgagee, it is neither unreasonable nor improper that courts of law, at the instance of other creditors, should treat the land as his, under the same limitation. There is no more inconvenience in subjecting the land to execution, because there is a mortgage upon it, than there is where a prior judgment has bound it. The vendee, in both cases, will purchase subject to the *lien;* and he can calculate the value, deducting the encumbrance, as correctly in the one case as in the other. The difficulties suggested on the subject, are not found to exist in practice. The *English* courts have gone so far as to consider the equity of redemption of a mortgage of a term, as bound by an execution *at law in the like manner as if it was the term itself. A judgment creditor is required to take out execution at law, in order to create a *lien* upon an equity of redemption of a term, before he is entitled to go into chancery to redeem. The statute of frauds also makes lands, in the hands of a trustee, liable to sale on an execution against the *cestui que trust;* but this is considered as applicable only to a strict technical trust, and no case has gone so far as to allow an equity of redemption to be sold at law. This seems, however, to be implied in the remark, that a tenant, by the *elegit*, can redeem an equity of redemption; for, to be a tenant by the *elegit*, he must have been put into possession by the sheriff. But the question was finally settled in 1781. An equity of redemption

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3 *Atk.* 200. 29 *Car.* II. adopted, 1 *Rev. Laws*, 68.

Bunb. 347.

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was sold on execution; and on a bill to redeem, it was contended, on behalf of the purchaser, that an equitable interest might be taken in execution; and that the sheriff's sale was the same as the conveyance of it. The Lord Chancellor, however, after some hesitation, set aside the sale, on the ground, that an equity of redemption was not liable to be taken in execution under the statute of frauds; although he admitted, that under that statute the sheriff might extend an equitable interest, or in other words, a *chose in action*. *Choses in action* are, in other instances, liable to execution at law. Long before the statute of frauds, it was held, that the sheriff, on an *elegit*, might extend a rent-charge, although he could not a rent-seck; which, being wholly detached from any right in, or power over, the land, could not be delivered as *liberum tenementum*. The sale of an equity, with us, must then depend upon the construction of our statute. I have taken this slight view of the *English* law to show, that if our act be an innovation in this instance on the previous law, there is nothing in it that ought to alarm us, as incongruous or unreasonable; for it is certainly agreeable to the general bent and spirit of the more modern decisions. If I am rightly informed, we have in this state a long and established practice in favour of such sales. This usage is of itself deserving of considerable weight. The practice of selling equities of redemption, with us, is supposed to be at least as ancient as the statute of 5 *Geo.* II. c. 7. in the year 1732. That statute made lands, hereditaments, and real estates, within the *English* colonies, chargeable with debts, and subject to like remedy and process in *any court of law or equity, by seizing and selling as personal estates. The statute uses the broad expressions of lands, hereditaments, and real estates. They were to be treated exactly as personal property; and it became usual to regard lands and real estates as assets in the hands of executors, and to cause them to be sold on execution against executors. This practice continued down to the year 1786, when it was abolished. Equities of redemption continued to be sold to the time of

Lyster v. *Dolland*, 3 *Bro. Ch. Cas.* 478. 1 *Ves. jun.* 431. *S. C. Burden* v. *Kennedy*, 3 *Atk.* 739.

Cro. Eliz. 742. *Ibid.* 656.

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Laws of N. Y. edit. 1789, v. 1. p. 287.

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the first revision of our statute law, when the sale of lands on execution was particularly regulated; and if it had been intended to have abolished that practice, it is probable the act would have contained some explicit declaration on the subject, or at least that it would have used precise and definite terms, that could not mislead, or be misunderstood. But the act of 1787 adopted the same loose latitudinary terms as those in the statute of *Geo.* II. It declares, that all and singular the lands, tenements, and real estate of every debtor, shall be liable to be sold upon execution, to be issued by virtue of a judgment in any court of record. This whole provision is therefore made by the very terms of it, exclusively applicable to a court of law; and whatever interests are included within the description of real estate, they are equally included within an execution at law. And there can be no doubt, I think, but that an equity of redemption will be comprehended in the expression. The form of the execution prescribed by the act, ought not to be construed to control this substantive part of the statute; and, if they cannot be reconciled, the general direction, from the nature of the two provisions, ought to prevail. We have seen, from a case I have already mentioned, that a *liberum tenementum*, or freehold, will include a rent-charge, although the fee of the land resides elsewhere; and the word *land*, in the body of the execution, will apply to the mortgagor's estate, especially as the word *seisin*, in a statute, is frequently construed to apply to an equitable, as well as to a strict legal seisin. The application is always according to the subject matter, and to give the statute complete effect. There were several objections strongly urged to this construction of the act. It was said, that the remedial provision in the other parts of the act, in case of eviction of the purchaser, will not apply to the case of a purchaser of an equity of redemption. I have not been able to *discern why the purchaser of an equity of redemption cannot, in the first place, obtain possession of the land, as against the mortgagor or his assigns;

2 *Bro. Ch. Ca.* 268 to 272.

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and why he may not afterwards be evicted. The judgment is undoubtedly a lien on the land, notwithstanding the mortgage. We have seen, that where a term for years is mortgaged, the equity of redemption is bound by execution in like manner, as if the term had not been mortgaged; and, except where the mortgagee himself is a party, I should doubt whether the mortgagor would be permitted to set up the mortgage in opposition to the purchaser. Where the mortgagee's rights are not in question, the mortgagor is regarded as the owner. A court surely would not permit a juryman to excuse himself, by denying he was a freeholder, because there was a mortgage on his land. A mortgagor in possession, and before foreclosure, is competent to be a tenant to the *præcipe;* for he can levy a fine, or suffer a recovery. He is therefore a tertenant; and, in the case stated at the bar, I should incline to think the judgment creditor might have a *scire facias* against the heir or assignee of the mortgagor. But it is not essential to give any definitive opinion on these points; nor do I wish to be understood to do so, for, admitting that the remedies to the purchaser of an equity of redemption are not as complete as they are in other cases, this will not limit the operation of the positive directions and powers in the act to which I have alluded. It would only be to be regretted, that the remedial part of the act was not extensive enough; and it might lead to legislative amendment. The creditor in *England* was allowed his extent a long time before the statute provided a remedy for him on eviction. And perhaps similar difficulties might be started, as to the power of a court of law, to give full effect to the purchase of a trust estate, under the statute of frauds; but still the sale thereof, on execution, is not to be disputed. The selling of real estates, and equities of redemption on execution, is peculiar to us; and it would not be surprising, if some of the technical rules of the common law might meet with difficulty in their application to the case. If the purchaser can take possession as against the mortgagor, when in possession,

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he may defend himself against an ejectment by the mortgagee, by bringing the debt into court. In this way he may protect himself completely at law. The doctrine of *equitable assets (and which was much pressed upon us in the argument) is not, however, affected by allowing the sale of an equity of redemption. It is settled, that an equity of redemption is not equitable assets, as against judgment creditors. Arguments drawn from inconvenience are entitled to much consideration, in cases of doubtful construction; but, in the present case, I am of opinion they operate in favour of the decree. A very considerable part of the lands in this state are under mortgage to the loan-offices, and to individuals: it is likely they will continue so; and if judgment creditors are under a necessity in every case of resorting to chancery, for leave to sell the land of the debtor, it would create double suits and double expense, and would lead to much inconvenience and delay. After, therefore, the best attention I have been able to bestow upon this nice and important legal question, and which was argued by counsel in a manner that did much credit to their researches and abilities, I am of opinion the decree below ought to be affirmed. The mortgagor was in possession when the equity was sold, and that formed a material ingredient in the case. This opinion, therefore, is not intended to apply to the case of a mortgagee in possession.

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John G. Leake and Bernardus Swartwout, junior, } *Appellants*,

And Melancton L. Woolsey, Nathaniel Platt, Robert Cochran, Jonas Platt, Zephaniah Platt, John Bailey, James Kent, William Bailey, James Bailey, and George Ker, } *Respondents*.

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If one of many joint mortgagors assign his interest to a third person, who is accepted by the mortgagee in substitution of the assignor, and an endorsement be made on the mortgage and bond, that such third person is accepted in lieu of the share the assignor holds in the bond, and is looked to for his proportion accordingly, the land will be exonerated from the proportion of the assignor, on his assignee giving bonds for the balance of an account between the mortgagee and the assignee, in which the assignee is debited for the amount of the proportion, provided it appear that those bonds have been satisfied, notwithstanding such satisfaction be under a settlement made after cancelling the original bonds of the assignee, by giving other securities, and at the time of giving the same, the assignee have notice of an assignment of the bond and mortgage by the mortgagor, made between the first and second settlements.

ON appeal from chancery, the case was this: The respondents, excepting *Ker*, had purchased of one *Coll M'Gregor*, a large tract of land in the county of *Clinton*, for the sum of 10,241*l.* 10*s.* Of this 2,000*l.* only being paid in cash, the residue was secured by a bond and mortgage from the purchasers, dated on the 24th of *February*, 1796, payable in four instalments; three of 2,000*l.* and the fourth of 2,241*l.* 10*s.* the first on the 1st of *June*, 1798, without interest; the rest on the first days of *June*, 1799, 1800, and 1801, with interest. At or about the time of executing this bond and mortgage, *Ker*, *wishing to buy out the interest of *Cochran*, agreed with *M'Gregor* and *Cochran*, to be substituted in the place of *Cochran* with respect to his interest in the lands, and also with respect to his responsibility for the money secured to be paid by the mortgage. In consideration of being so substituted, *Ker* agreed to give *Cochran* 100*l.* for his bargain, and to repay him his proportion of the 2,000*l.* cash, paid to *M'Gregor*, amounting to the sum of 200*l.* In consequence of these arrangements, *M'Gregor* lent to *Ker* the 100*l.* agreed by him to be paid to *Cochran*, and returned to *Cochran* the 200*l.* received as his proportion of the 2,000*l.* paid down. A memorandum of the purpose with which these transactions were had, was made on the bond and mortgage in these words: "I acknowledge and accept "of *George Ker*, Esq. in lieu of the share which *Robert Coch-*

"*ran* holds in the within bond, and look to said *Ker* for his "proportions accordingly. *New-York*, 24th of *January*, 1796." *Cochran*, on this, by the direction of *Ker*, conveyed his interest in the lands purchased of *M'Gregor*, consisting of one tenth, to Mrs. *Ker*. On the 25th of *June*, 1796, *Coll M'Gregor* settled an account with *Ker*, on the balance of which there appeared due from *Ker* 16,334*l*. In this account *M'Gregor* debited *Ker* with 1,100*l*. for 2,000 acres of land held with *Platt* and others. In satisfaction of the balance thus struck, and in pursuance of *M'Gregor's* desire, *Ker* gave his bond, (3,750*l*. of which had been paid to one *William Maxwell*,) and for the residue the joint bond of himself and wife, payable one year after date, with interest at six *per cent*. to *Isabella S. Fotheringham*, between whom and *M'Gregor* a treaty of marriage at that time subsisted. Within two months after settling the above account in the antecedent manner, it appeared on a more accurate investigation, that some errors had crept in, which were by consent rectified, and by an endorsement on the last mentioned bond, the amount was reduced to 10,507*l*. 0*s*. 6*d*. On the 10th of *November*, 1796, the bond and mortgage from the respondents to *M'Gregor*, were assigned to him by the appellant *Swartwout*, in part payment for an estate. Of this assignment *Ker* had notice about the last of *November*, 1796. *Swartwout* owing a large debt to the other appellant *Leake*, in order to secure its payment, assigned to him the bond and mortgage from the respondents. From an answer of the respondent **Ker* to a bill filed against him and others by the assignees of *Coll M'Gregor*, it appeared that in *January*, 1798, *Coll M'Gregor*, (between whom and Miss *Fotheringham* a coolness then subsisted,) demanded of *Ker* the bond which he and his wife had executed to her. In consequence of this, *Ker* obtained the bond from Miss *Fotheringham*, and carried it to *M'Gregor*, in whose presence it was, with his consent, cancelled and burnt. Shortly after this transaction, an account was again stated between *M'Gregor* and *Ker*, on which the latter was found indebted to the former 10,507*l*.

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exclusive of a loan of $5,000. In satisfaction of these sums, *Ker*, with the concurrence of *M'Gregor*, destroyed a declaration of trust from the latter, for township No. 28. in *Jessup's* patent. After this, the settlement thus made, was, at the request of *M'Gregor*, waived by *Ker*, who having a bond and mortgage from one *Hamilton* and others to himself, assigned them over to *M'Gregor* in full of all demands. *M'Gregor* died since, insolvent. The bill below was against the respondents for payment of the debt of 8,241*l.* 10*s.* with interest, or that they might be foreclosed. The Chancellor ordered that *Cochran's* one-tenth should be considered as paid, and that it should be referred to the master to report, after deducting his one-tenth, what was due on the mortgage; and that the same should be paid by the original obligors. For this decree his Honor thus assigned his reasons:

Mr. *President*---In my opinion, the mortgage and bond, being the joint act of *all* the parties, could not, as far as respected their respective interests, receive a new modification without the consent of all. It was, however, competent to *M'Gregor* to receive the portions of one or more of the obligors, and to credit the amount paid, which, though placed to the account of all the obligors as so much paid of the debt, generally, would, if the whole proportion of the person paying was satisfied, operate to discharge him in any action for contribution between themselves. The operation of *a release to one* of the parties to a joint contract, to discharge all, is *stricti juris;* it is on the ground of a presumed satisfaction, and severance of contract which it implies. But though this is the doctrine of strict law, the same degree of rigour is not extended to devices calculated to produce the same effect in a more circuitous mode. So a covenant not to sue, cannot, it has *been held, be taken advantage of at law, *by way of release.* It is evidently in the power of a person holding a joint contract, so to direct a suit on it, as to charge only one or more of the joint contractors, and is every day's prac-

1 Ld. *Raym.* 265.

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tice at law; and the only remedy of the persons against whom the recovery is had, is to enforce a contribution from their contractors, not affected by the recovery. If however those have already satisfied their full proportions, no injury having arisen to the persons subject to such recovery, there is no point on which they can rest their claim to contribution. If this may be done tacitly, I can discover no good reason why it should not be the legal object of a covenant indirectly to avoid a process for contribution. If the endorsement in this case had acknowledged the receipt of a sum of money equal in amount to *Cochran's* one-tenth of the debt, it would not be deemed prejudicial to the interests of the co-obligors; and whether it was actually paid in money, or agreed to be credited, on an arrangement between them, to substitute some other object existing in property on contract, could be of no consequence to any others than those, who were the parties to the transaction making such substitution. Assuming it then as legal, as well as equitable, in certain cases to permit the person complying with what is deemed his full proportion of duty on his contract, to be virtualy, though not formally, discharged by the agency of the person with whom the joint contract is made, the next question is, What was the operation of the agreement in this instance? The endorsement, both in the bond and mortgage, is, "I acknowledge and accept of *George Ker*, in "lieu of the share which *Robert Cochran* holds in the with-"in bond." This part of the agreement is inaccurate in its language: it speaks of acknowledging and accepting of *Ker*, *in lieu* of *Cochran's* share, which it is said *he holds* in the within bond; but however inapplicable the term *hold* may be, as descriptive of a duty, the former part of the sentence distinguishes, not the person of *Ker*, as instead of that of *Cochran*, but with precision, the acceptance of the person of *Ker*, in lieu of *the share* of *Cochran;* this is, in my opinion, a strong mark of the intent. There were ten obligors, and from the silence of the securities as to the inequality of interest, or obligation in discharge of the debt, I think it is a legal

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inference, that all were equally to contribute to its discharge; *there is no allegation of such inequality, and all the answers concur in representing the debt as an equal one on all the parties. If this is admitted, the share of *Cochran* was susceptible of exact liquidation by a simple arithmetical process, which only was necessary to reduce it to certainty. If so, the *share of Cochran*, in language, is as little subject to doubt, as if the parties had expressed themselves in the more definite terms, of the precise number of dollars intended to be considered as satisfied; and, whether the acknowledgment was, that he had received a certain sum, or that he had made an arrangement to credit a certain sum, in consequence of *Ker's* responsibility to him, does not, in my opinion, materially vary the situation of the parties. In both cases, the other parties might be called upon to adjust the difference of payment by contribution, if in the event of a suit on the joint contract, an additional sum should be exacted from him, beyond his proportion. By way of fixing this intent more determinately, it is added, that *he looks* to said *Ker* for his proportion accordingly. This looking to *Ker* for his proportion of *Cochran's*, seems to be in pursuance of the same idea; not that he looked to *Ker* as a substitute in the contract for *Cochran*, but to *Ker* for the proportion of *Cochran*. Indeed, it can scarcely be presumed, that the parties could have supposed a complete substitution legally practicable; it could not have entered into their imagination, that *Ker* could be considered as a co-obligor with the others; and if not, the mortgage, being merely a collateral security for its discharge, must be considered as invalid to the amount of the satisfaction on the bond. I do not, however, mean to assert, that it was not in the power of the parties so to modify this transaction, as to retain the lien on the lands, and virtually to discharge the person of *Cochran;* yet that if this was done by way of release, it would, in legal operation, destroy the whole instrument, cannot be urged with effect against the mode adopted by the parties. The complainants received

the bond and mortgage with the endorsement to them, calculated to disclose the nature of this transaction. Whatever might be the consideration or inducement as to *Ker*, the contract made with *Cochran*, and his parting with his share of the land to *Ker's* wife, was a sufficient consideration as to him; and whatever complexion the business might assume, as between *M'Gregor and Ker*, the *right of creditors not being affected by it, it could have no retrospective effect, so as to avoid the contract made with *Cochran*. As between *Cochran and M'Gregor* it was conclusive, and it does not lie in the mouth of the complainants, now representing *M'Gregor*, to set up subsequent transactions, to which *Cochran* was a stranger, to impeach a bargain which he is interested in maintaining, nor ought they to be permitted to charge the other mortgagors with a sum of money, which the person from whom they derive their rights has relinquished, as part of the money secured by this mortgage. It cannot therefore be necessary to trace the winding steps of *M'Gregor*, *Ker*, *his wife*, and *Miss Fotheringham*, detailed in the answers of the latter in another cause, which were used at the hearing; for all those relate to transactions subsequent to the agreement, in consequence of which the endorsement was made, and cannot possibly affect it. The letters of the several defendants are conceived in general terms, and nothing is to be collected from them prejudicial to their interests; for the expressions in these letters would equally apply to half, or a smaller portion of the money secured, if no more remained unpaid; but a better reason is, that supposing *Cochran's* share satisfied, no act of theirs, as against the other mortgagors, could place it *in statu quo*, nor could it possibly replace *Cochran*, as a party liable. And if not, it would certainly be very inequitable to compel them to pay his proportion, without a possibility of resorting to him for a contribution. From this train of reasoning, I am of opinion that *Cochran's* one-tenth must be considered as paid, and

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that it be referred to a master to report the sum due, rejecting the one-tenth.

Against this, the appellants contended, 1st. That whatever might be the effect of the agreement between *M'Gregor*, *Cochran*, *and Ker*, upon the bond, at all events, the land remained liable, as *Ker* took *Cochran's* conveyance, subject to the mortgage. 2d. That the settlement with *M'Gregor*, by *Ker*, was fraudulent, and after notice of his assignment, as was evident, 1st. From the non-production by *M'Gregor* of the bond and mortgage, at the time of this pretended settlement; and was in itself a sufficient reason to presume an assignment. 2d. From the known insolvency of *M'Gregor*. 3d. That allowing the first settlement to have been good, still, when the bond to Miss *Fotheringham* was
* 79 given up and cancelled, it was *as if it had never been in existence, and then the subsequent settlement was clearly fraudulent, being after notice admitted.

On behalf of the respondents it was insisted, That the words of the endorsement clearly exonerated the land from *Cochran's* proportion, *M'Gregor* having thereby accepted *Ker* as his debtor for that amount. That this was evident, 1st. From the account, in which *Ker* is charged 1,100*l.* for the land held by him, with *Platt* and others. 2d. The money due on the bond and mortgage was not payable till the expiration of two, three, four, and five years, but on the bond given by *Ker* it was due in one year. 3d. The return of the 200*l.* to *Cochran*, evinced a new transaction, in which the original liability of *Cochran* was done away.

Harison, for the appellants. It is contrary to reason, to suppose landed security should be relinquished for personal. The intention of the parties, from the words of the endorsement, was, that the person of *Ker* should be substituted for that of *Cochran*, but that the land should remain charged. The estate in it was vested in *M'Gregor* by

the mortgage, and it could not be devested, without a compliance with the condition. It was impossible to effect this by the endorsement; for, nothing short of payment is a performance of the condition. The estate of the mortgagee, on executing the deed, passes out of the mortgagor, and upon common law principles, the mortgagee is seised of the fee, defeasible by performance of the condition. 1 *Pow. on Mort.* 226. If then the estate was in *M'Gregor* till performance of the condition, and that condition is now unperformed, the estate thus in him passes to his assignee, from whom we claim, and would be entitled, in an ejectment, to set up this our title. *Co. Litt.* 206 to 208. b. Till a reconveyance,† the legal estate remained in the mortgagee and his assignees. But it is contended, that the settlement made between *Ker* and *M'Gregor*, is equivalent to a payment *pro tanto*, and conclusive on the appellants. We insist, however, from the facts, that it appears *Ker* had notice of the assignment by *M'Gregor*, and that any payment afterwards made by *Ker* was in his own wrong. In order to affect with notice, it is not necessary that it should be written.‡ If the circumstances be such as ought to induce an inference that an assignment had been made, it is sufficient. The absence of the bond and mortgage, on the *first pretended settlement, was equal to this. But on the second, when the first was cancelled, a new bond and new modes of payment adopted, the notice is admitted. On this point, therefore, if on no other, we conceive the decree must be reversed.

† See *ante*, p. 52. note ‡.

‡ Whatever is sufficient to put the party on inquiry, is enough. *Smith* v. *Low*, 1 *Atk.* 489. And if a mortgagee be affected with notice, his assignee will take subject to it. *Whalley* v. *Whalley*, 1 *Vern.* 484.

Pendleton, contra. It is needless to say any thing on the necessity of a reconveyance, to revest the estate of the mortgagor. For what has been urged on that head, applies only to cases where there has been a forfeiture, and the estate rendered absolute in the mortgagee. Here, however, if the estate is discharged from the tenth of the mortgage-money, it is by a payment made before forfeiture.

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The first instalment on the bond was due in *June*, 1798. The most disputed settlement by *Ker*, was in the *January* antecedent. But the payment, as it in fact was, which then took place, was not of the money due on the bond and mortgage. That had been, as to *Cochran* and his substitute *Ker*, previously satisfied by the bonds in *June*, 1796, at which time *M'Gregor* was owner of both bond and mortgage. The transaction which then took place was a complete act; and surely at that time he had a right to take payment of his mortgage-money in any way he pleased. He did then, on that day, as appears from the account in his own hand-writing, receive, in a manner pointed out by himself, payment of 1,100*l.* from *Ker*, for the 2,000 acres of land, held by him with *Platt* and others, the very identical share of *Cochran* in the original purchase from *M'Gregor*. The subsequent assignment to *Swartwout* could never defeat this payment, thus fairly and fully made. After this settlement, so perfected and carried into execution, whether the bond by which it was effected was destroyed, or in whatever way satisfied, nothing which took place relating to it could revive rights long previously extinguished, and that in favour of persons who then had none. By the words of the endorsement, *Ker* was substituted for *Cochran's* portion in the bond; for that portion the land was only a security; when, therefore, that portion was paid by the bond to *Maxwell*, (which has been fully discharged,) and the bond to Miss *Fotheringham* given for the collective debt of *Ker*, the land was necessarily exonerated. In the endorsement, *M'Gregor* says he looks to *Ker*. This is a strong declaration that he does not look to the land. If so, it is a criterion on which the exposition *of the endorsement is to be made. For in expositions, the intent is the governing principle. 3 *Atk.* 135.† And that the intent should be to look to the person of *Ker*, is not so surprising, if we consider *Ker's* personal transactions with *M'Gregor* then amounted to 16,000*l.* Besides,

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† *Smith* v. *Parkhurst.*

there was an inducement to accept *Ker's* personal security, and exonerate the land. It accelerated the payment five years. The rate of interest was altered from 7 to 6 *per cent.* How then could land continue liable for a sum at seven *per cent.* when a bond was given for the same sum at six? It is plain, that to obtain payment at an early day, the land and one *per cent.* was given up. To discharge land of a mortgage debt, any common parol declaration or discharge is sufficient. 1 *Pow. on Mort.* 187. The endorsement therefore is adequate. Then, if the debt was discharged, the land followed of course. *Martin*, ex dem. *Weston*, v. *Mowlin*, 2 *Burr.* 979. On this principle the doctrine of notice will apply most forcibly to the appellants. The endorsement on the bond and mortgage purported an exoneration of the land, and the personal substitution of *Ker*. The assignees, therefore, of such bond and mortgage, received them after a full notice, written on the instruments. The subsequent payment of a prior personal substitution for the share of *Cochran*, could not revive those rights, which that personal substitution, and the bonds thereon given, had extinguished.

Hamilton, in reply. It is on that subsequent payment we think we have a right to rely. When it was made, *Ker* had full notice of the assignment to *Swartwout*. Instead of settling, or paying as it is termed, he should have withheld, till convinced that his payments would not prejudice the rights he knew were transferred to *Swartwout*. Acting otherwise, evinced a spirit of favouritism. On the point of substitution by the endorsement and conveyance, it must be held, that when *Ker* took the estate and place of *Cochran*, he took them with all the liabilities they were under, when held and occupied by him, into whose shoes he stepped. If the payment of a proportion of the mortgage by *Cochran*, would not extinguish in *M'Gregor* the right to charge all the land with the residue, it could not when made by *Ker*, deprive him of it. Therefore, allowing the substitution in the fullest extent, and the tota lexoneration of *Cochran*, that was no

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discharge of the land. All that can be effected by the payment of *Ker*, is a diminution *of the charge on the land, not a diminution of the land charged. If, by his proportion continuing liable, he pays twice, that is a matter of contribution between him and his coöbligors, but nothing to us, who receive only our original sum. At law, the endorsement could never operate to discharge the person of *Cochran*; in equity it might. But in equity it never would be considered as being a *pro tanto* discharge of the land from the mortgage. Therefore, though equity, perhaps, would not have allowed *M'Gregor* to proceed against the person of *Cochran*, it would have permitted a foreclosure against *Cochran's* share in the hands of *Ker*. If this would have been endured in *M'Gregor*, certainly in his assignee. The whole of the settlements relied on, are bonds for bonds, and therefore no payments. The facts, however, warrant a presumption, that the bond to Miss *Fotheringham* was in consideration of marriage, and as a portion; when the marriage did not take effect the consideration failed, and the money intended to be secured to Miss *Fotheringham* became due to *M'Gregor*, as his original property in the bond and mortgage. To pay money for that proportion of the bond and mortgage afterwards to *M'Gregor*, was to make a payment on that which *Ker* knew was assigned to the respondent *Swartwout*. It consequently was done in his own wrong, and we have a right to look for the whole amount from the persons bound, and all the land originally charged.

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The majority of the court being of opinion with the *Chancellor*, for the reasons he assigned, it was ordered that the DECREE BE AFFIRMED.

SPENCER, J. contra. The questions arising in this cause, are principally—1st. What is the legal effect of the endorsement made on the bond and mortgage, given to *Coll M'Gregor* by *Robert Cochran* and nine others, whereof *Ker* is not one, in these words: "I acknowledge and accept of

George Ker, Esq. in lieu of the share which *Robert Cochran* holds in the within bond, and look to said *Ker* for his proportion accordingly. *New-York*, 24*th February*, 1796." 2d. Whether, from posterior transactions, the appellants have lost their right to insist on the mortgage as a security, as well for the nine-tenths, as for the one-tenth part of the money thereby secured, and due from *Cochran*, provided the above endorsement did not, in judgment of law, operate to discharge *Cochran's* *share due on the mortgage? I shall consider the first question independently of the alleged understanding of the parties. This, for three reasons; 1st. Because this is not a controversy between the original parties to that transaction, (*M'Gregor* and *Ker*,) but between the assignee of the former and *Ker*. When this assignment was made to *Swartwout* by *M'Gregor*, it was for the whole sum expressed in the mortgage. The endorsement, to be sure, was on it; and by the true exposition of that endorsement, was his interest and right acquired in it to be determined, without reference to any conception of the parties, as to the operation of that endorsement. 2d. Because parol evidence, substantially to vary or impugn an agreement in writing, even as between the same parties, cannot be admitted, much less between one of the parties and a third person, who has acquired a right under such agreement. 3d. Because, whatever *M'Gregor* might say in relation to his understanding of the intent and operation of the endorsement, ought not to be regarded; he having, for a full and valuable consideration, assigned the mortgage as due *in toto*; his subsequent declarations to the contrary, would evince that he had been guilty of a fraud in that assignment, and this would justly derogate from his testimony. If the rule, that, in assignments of *choses in action*, the assignee takes them subject to all the equity between the parties, does obtain upon the assignment of a mortgage, and of which perhaps there is doubt, still it cannot reach a case of this kind, where the parties wholly relied on a written stipulation, and must be bound by its construction. The endorsement will

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Morris and others v. *Ansell*, 3 *P. Wms.* 275. 3 *Ves* jun. 34. 2 *Atk.* 583. *Ib.* 558.

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not admit of a literal construction. *Cochran* held no share in the bond, but was held by it to the payment of the sum expressed. *M'Gregor* accepted *Ker* in lieu of *Cochran* in the within bond, and was to look to him for his proportion accordingly. It is to be recollected, that the endorsement was both on the bond and mortgage in the same words; and it is to be presumed, because universally the case, that the mortgage had reference to the bond; and no reason can be assigned why, when the endorsement was made on the mortgage, *Ker* should be accepted in lieu of *Cochran*, as to his liability on the bond only, if the parties had intended that *M'Gregor* was to renounce the real security he held. The expression of the one is the exclusion of the other, especially when this endorsement is made on the mortgage, and refers *to a bond. If collateral facts, existing at the time of the transaction, be resorted to, and if we are to imagine *M'Gregor* actuated by his interests, these considerations would unite in evincing that it could not have been his intention to waive the security he had, but merely to substitute *Ker* for *Cochran*, so far only as regarded personal responsibility. But in making up my opinion on this point, I put out of view these circumstances, and look to the words of the endorsement, as the only true *indicia* of the intention of the parties. The agreement only extends to the bond, and I cannot say, in contradiction to that, the parties meant the mortgage. Have subsequent transactions varied the case so far, as that either the debt has been forgiven, the bond discharged, as respected *Cochran's* proportion of the debt, or the mortgage reduced by as much as that proportion? The respondents rely much on the exhibition of an account by *M'Gregor* against *Ker*, in *June*, 1796, wherein he charged the latter of *Cochran's* proportion of the bond and mortgage, and also upon the execution of a bond by *Ker* and his wife, to Miss *Fotheringham*, by the directions of *M'Gregor*, as a further security from *Ker*, for *Cochran's* proportion of the debt in the bond and mortgage, payable at a shorter period, and at a different rate of interest than was

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required by the bond and mortgage given by the respondents originally to *M'Gregor*. These transactions are relied on in two points of view: first, as evidence that *Cochran* was discharged from his liability; and, secondly, as an extinguishment of the debt so due from *Cochran*. As regards the first, I am clearly of opinion that the endorsement on the bond and mortgage did not, in law, exonerate *Cochran* from his liability. In the case of *Rogers* v. *Payne*, 2 *P. Wms.* 376. an action of covenant was brought for the non-payment of a sum of money, the defendant pleaded a discharge, in the nature of a release without deed, in satisfaction of all demands. Upon demurrer, it was objected for the plaintiff, that the plea was ill; for that a covenant to pay money, which is by deed, cannot be discharged without deed, and of that opinion was the court, and gave judgment for the plaintiff. If, then, the endorsement only affected the bond, and if that could not, in law, be discharged without payment or release, it follows, that the endorsement can in no way have effect. As respects the extinguishment, nothing can be more clear or better settled, than that, to extinguish *a debt, something of a higher nature than the debt to be extinguished must be given. To give one bond, for a debt secured by another, is no extinguishment. Had the bond given by *Ker* and wife to Miss *Fotheringham* been paid, the case indeed might have been materially changed; but after the assignment of the bond and mortgage by *M'Gregor* to *Swartwout*, and after notice from the latter to *Ker*, the bond to Miss *Fotheringham* was, at the instance of *M'Gregor*, given up, cancelled and burnt; and when *Ker* might and ought to have regarded the notice from *Swartwout*, that the whole mortgage was his, and he alone entitled to be paid, he proceeded to enter into other arrangements to pay *M'Gregor*; and now insists on such payment, made, as I conceive, in his own wrong. Had *M'Gregor* retained the bond given to Miss *Fotheringham*, after it was in his custody, and then insisted on *Ker's* providing differently for the payment of it, the case would have been very different from

Yelv. 192. 6 *Rep.* 44. *Blake's case.* *Cro. Jac.* 254.

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what it is; but that bond was destroyed, *Ker* then was at liberty to have refused paying *M'Gregor* by so much as the amount of *Cochran's* share came to; this he did not, though he had notice; but afterwards, at a different time, satisfied *M'Gregor;* first, by a sale to him of lands at 100 *per cent.* more than they cost him; and subsequently, by assigning another bond and mortgage. I have paid due attention to the authority cited by the respondents' counsel, and I agree with him, that a mortgage may be discharged by *parol*, or may be forgiven, because it is not a conveyance of land within the statute of frauds; but this mortgage has never been discharged, or forgiven, or paid, until after it was assigned. I agree further, that the payment of the money will draw the land after it, provided the payment be to the right party. A bond, however, cannot be so discharged. On the whole, it appears that the appellants or respondents must lose so much as the share of *Cochran* amounted to. The appellants gave a full consideration for the mortgage; the respondent *Ker* has paid to the amount of *Cochran's* share, but he so paid it to a person not having a right to receive it, with full notice not to pay him; he paid it, too, without any legal necessity, consequently he ought to pay it again, and to the right person. I am of opinion, that the decree ought to be reversed, and that the appellants be permitted to insist on a foreclosure, as well for the amount of *Cochran's* proportion of the debt, as the residue of the mortgage.

* 86 *Thomas Jenkins *against* the President, Directors, and Company of the Union Turnpike Road.

A turnpike act, incorporating a company, with a clause vesting the road, on a certain event, in the people, is a public act, *ut semb.* The mere subscribing to stock in a turnpike company, where a part of the amount of each share is ordered to be paid at that time, gives no interest in the stock if the money be not paid, and the company cannot bring an action for the amount, as it is *nudum pactum.* A clause of forfeiture of shares subscribed, takes away the right of suing for them, or money ordered to be paid upon them.

ERROR on the judgment of the supreme court, in a suit between the same parties, in which the now plaintiff was

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defendant below, and the now defendants, plaintiffs. The case was as reported in 1 *Caines's New-York Reports*, 381. Upon the decision there pronounced, the plaintiff assigned the following errors: 1st. That the action being founded upon the act entitled, "An act to establish a turnpike corporation, for improving the road from *New-Lebanon* to the city of *Hudson*," passed the 3d of *April*, 1801, as set forth in the declaration, it is not alleged, nor in any way stated, that the said *Thomas Jenkins*, at the time of subscribing, or at any other time, paid to the said commissioners ten dollars, or any other sum of money, on each, or any share of the said stock, by which the said *Thomas Jenkins* would become entitled to the said shares. 2d. That it does not appear by the said declaration, that the parties were mutually bound to each other; but that the said commissioners were at liberty, at any time before the surrendering up to the said company the said subscription, to erase the name of the plaintiff from the said subscriptions, and to receive others in the place thereof; nor does it appear that the said commissioners, or the said president and directors, ever did any act before the commencing the action below, by which they were bound, or in any shape liable to the said *Thomas Jenkins*, for the said stock, by virtue of the said subscription. 3d. That it does not appear in the said declaration, that there was any determination of the president, directors, and company of the said turnpike, for the payment of the said several sums of money by the said stockholders, according to the conditions and terms of the said subscriptions. 4th. That the promises set forth in the said declaration are void, for want of consideration. 5th. General errors. On these grounds it was insisted the judgment ought to be reversed.

The defendants contended, it ought to be affirmed for the following reasons: 1st. Because it does not appear on the record, that ten dollars was by the act required to be paid on each share subscribed. and, as it does not appear, it cannot be *assigned for error. 2d. Allowing it might be so

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assigned, as the obligation prescribed by the act is to the president, directors, and company, for the whole amount of twenty-five dollars upon each share, and as the payment of ten dollars upon each share was for the benefit and use of the company, the non-payment of this latter sum cannot be assigned by the plaintiff, as an objection to the payment of the former, because he would then be permitted to take advantage of his own wrong. 3d. Because the commissioners were authorized only to receive, and not erase subscriptions, and by admitting the subscription, were bound to consider the plaintiff a stockholder, until they should declare his shares forfeited; and by their calls upon him for his instalments, they acknowledged his right to call on them for dividends. 4th. Because the president and directors are the only organs, through or by which the affairs of the company can be conducted. 5th. Because the subscription passed to the plaintiff an interest and right in the stock of the company, by virtue of which he was entitled to dividends, and created therefore a consideration sufficient to support his promise, for breach of which the action was brought.

Woodworth, Attorney-General, for the plaintiff. Against going into the first error we have assigned, the defendants insist, that as the circumstances we there rely on do not appear on the record, we cannot avail ourselves of them, though they are specified and required by the act of incorporation, under which the present suit was brought. To decide on the force of this objection, we must inquire whether this be a private or a public act. If it be the latter, then the court must take notice of it, and we may avail ourselves of all its provisions. It is not necessary to plead a general statute, 19 *Vin. Abr.* letter C. *pl.* 8. And every statute is general which may apply to every man. *Ibid. in notis.* This is clearly such a statute, for every man may be a stockholder, and every man may use the road, and must pay. So every act which concerns the king, though the matter of it relate

to individual persons or things, is a public statute, of which the judges *ex officio* must take notice. Therefore the 2 *Ph. & M.* concerning the trade of a dyer, is held to be a public act, because the forfeiture goes to the king. *Ibid. pl.* 11. *in notis.* Within this principle, the act in question must be a public act, for, after a certain period,† *by the 12th section, "the right, interest, and property of the said road shall be vested in the people of this state." Also, by the act ordering the publication of the laws,‡ the persons appointed to revise them, were directed as a matter of "duty," to insert in a separate volume, the titles of acts of a partial or local nature. In executing this direction, they have, in the 2d vol. *Rev. Laws*, 518. placed under a particular title of "special,"§ many laws; but amongst them this is not inserted, and therefore they must have considered it a public statute. The court below have acted on this as a public law, and referred to it in their decision, in consequence of the counsel now opposed to us, having in their argument treated it as a general statute. On the face of this law, it will not support the present suit. It prescribes a peculiar remedy, on failure of the party subscribing for stock. His shares are to be forfeited. It was not therefore the intention of the legislature to permit an action at law. The loss of the ten dollars ordered to be paid, to raise a fund of $20,000 to commence the road, and the forfeiture of the share, was the punishment inflicted by the act for a non-compliance with the subscription engagement. The subscription created no contract, and gave no rights. It was merely to ascertain the stock taken up. But at all events, to acquire a right in that stock, the payment of $10 was necessary, and ought to have been averred. Without payment, the contract was *nudum pactum*, as it could not be enforced against the corporation. To give a right, two acts were made necessary, subscription and payment. A compliance with one, gave no title to demand the stock, and unless both parties were bound, there was no contract in law. *Cooke* v. *Oxley*, 3 *D. & E.* 653. The consideration must be apparent on the record, and set

† After payment of principal and interest at the rate of 14 *per cent.*

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‡ 1 *Rev. Laws*, 620.

§ 2 *Rev. Laws*, 518.

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forth in the declaration. That the promise is stated to be in writing, is not sufficient† to show a consideration. *Rann* v. *Hughes*, 7 *D.* & *E.* 350. overruling in this point, *Pillans* v. *Van Meirop*. Wherever one thing is to be the consideration of another, though there be mutual promises, performance must be averred and proved. *Callonel* v. *Briggs*, 1 *Salk.* 112. The payment of the $10 ought, therefore, to have been expressly stated, as it was the sole ground of right against the company. For, unless it was by this means acquired, the payment of the $10 would have been without consideration.

† See the note in 1 *N. Y. T. R.* 386.

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*The payment of these $10, was a condition precedent; therefore, till that was performed, no right could accrue to

‡ *Thorpe* v. *Thorpe.*

Jenkins. 1 *Salk.* 172.‡ *Goodison* v. *Nunn*, 4 *D.* & *E.* 761. The declaration therefore should show a tender and refusal of the stock. The same doctrine is found in 1 *Vin.* 338. tit. *Actions of Assumpsit*, (Z. 3.) It is not enough to state the demand of $5, on an order by the president and directors. This does not evince that the plaintiff had the stock; and if he had not, he was not obliged to pay the order. The not setting forth a due consideration, is matter of substance, ever available of, and not cured by a verdict. *Foster* v. *Smith*, *Cro. Car.* 31. 1 *Sid.* 182.§ *Cro. Jac.* 503.¶ *Doug.* 679.** With respect to the order of the president and directors, it is sufficient to observe, that delegated authorities must be strictly pursued. The power is given to the president, directors, and company, and though only the two former may be the active parties, the order should have been in the names of all. The defendants relied in the court below, on the contract of the now plaintiff; let them therefore confine themselves to it, and show the breach within its letter.

§ *Cooke* v. *Samburne*

¶ *Lenneret* v. *Rivet.* Where two considerations are declared on, performance of both must be alleged; and if one averment be good, and the other bad, judgment on a general verdict will be arrested

** *Roshton* v. *Aspinall.*

Williams and *W. W. Van Ness*, contra. This is an action upon an express written contract, subscribed by the plaintiff in error. Its form is prescribed by the act incorporating the company. Its terms are explicit and intelligible, and

the legal obligation imposed by it, equally clear. The plaintiff, conceiving that sufficient matter in law did not appear upon the record in this cause, to support the judgment of the court below, has assigned four specific causes of error, to which is added the general assignment. In order more clearly to comprehend the force of these objections, it will be proper to read the contract on which the action is founded, as stated in the declaration. "We, whose names are hereunto subscribed, do, for ourselves, and *our legal representatives*, promise to pay to the president, directors, and company of the Union Turnpike Road, the sum of twenty-five dollars for every share of stock in the said company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors, and company." Before examining the errors assigned, it may be necessary to state what may be assigned for error, and whether that which is contained in the first error *can be the subject of such assign- * 90
ment: that is, whether matter *dehors* the record can be assigned for error, and whether the matter now assigned does appear on its face. The errors all point to supposed defects in the declaration. But if we can show that what is now assigned could not have been urged in arrest of judgment, then the court will not reverse the judgment. It does not appear, *from the record*, that the act contains one word of payment to be made at the time of subscribing. It alleges only, that the plaintiff did subscribe; not that any sum of money was to be paid. Therefore, nothing respecting non-payment can be assigned for error, unless permitted to search the act and travel out of the record. The rule is, nothing extrinsic, nothing which does not appear on the face of the record, can be assigned as error. It is laid down in 3 *Black. Comm.* 407. "that a writ of error lies only upon matter of law arising upon the face of the proceedings." So, 3 *Wooddes.* 359, 360. "if either party be dissatisfied with the judgment of the court pronounced, either on demurrer or arrest of judgment, (which, as already mentioned, must re-

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late to some matter apparent upon the face of the record,) the record may be removed, by writ of error, into a superior tribunal, in order to the reversal or affirmance of the former judgment." A further reason why the first error assigned cannot be maintained, is, that it discloses matter which ought to have been pleaded; and it is a general rule, that what may be taken advantage of by plea, cannot be assigned for error. *Com. Dig.* tit. *Pleader*, (3 B. 16.) *Cro. Eliz.* 4.† In the present case, the declaration did not state the act as ordering payment of the $10. The now plaintiff, to avail himself of it, ought to have disclosed it by way of plea, and then we might have traversed, or demurred, or taken issue on the payment. It was enough for us to set forth only so much of the act as made for ourselves. A declaration need recite no more of a statute than is pertinent to the action. *Com. Dig.* tit. *Pleader*, (2 S. 3.) *Ibid. Action upon Statute*, I. The residue should have come from the now plaintiff. In *Potter* v. *Reed*, *Cro. Jac.* 139. a second error assigned, was, "because the plaintiff founded his action upon the statute, and recites only such part thereof, whereby he would charge the defendant generally, whether he hath assets or not; and it appears, by the other parts of the act *pleaded by the defendant, that he is not chargeable, unless he hath assets of the money received upon the sale of the lands, or woods, or debts of Sir *T. G.* so the statute is not fully recited by the plaintiff. *Sed non allocatur*, for the plaintiff reciting what made for his advantage, the defendant may plead the residue if he will." The same doctrine is found in *Cro. Jac.* 506.‡ and in *Cowp.* 665.§ That this is a public act, we deny on the authority of the act cited by the Attorney-General, 1 *Rev. Laws*, 620. By the first section, all the public acts are directed to be contained in the first volume of the laws. This act is not there. It is within the description of a private act. *Com. Dig.* tit. *Parliament*, (R. 7.) 4 *Rep.* 76.¶ A turnpike act is no more a public statute, than one incorporating a bank. As to the clause, by which it is enacted, that on a certain event the

† *Margaret Marshall's* case.

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‡ *Bennis* v. *Guyldley.*

§ *Dundass* v. *Weymouth.*

¶ *Holland's* case.

road shall go to the people, it means no more than that it shall become a common road again. But allowing that the declaration is not so full as it might have been, it may be questioned whether any advantage can be taken of it now. After verdict, many imperfections are cured, which would, if urged before, have been fatal. 3 *Black. Comm.* 394. 1 *Sell. Prac.* 523. 2 *Wils.* 261.† 3 *Burr.* 1725. *Weston* v. *Mason.* For then, every thing will be supposed proved, which must at the trial have been established, to entitle to a recovery. 1 *Wils.* 255.‡ On the point of consideration there can be no doubt; mutual promises are sufficient in law to create good considerations. These, by the subscribing the note, were raised. On the one hand the plaintiff promised to pay, and on the other, the company promised to receive him as a stockholder. Suppose a man sells a horse for $100, and $10 to be paid down; in a suit by the vendor, can the vendee say the contract is annihilated, because he did not pay the $10? The words *legal representatives* evince, that the payment was not to be simultaneous with the subscription. The legislature intended the bargain and contract to be complete, on the mutual promises resulting from the subscribing. The clause empowering to cause to be forfeited the shares of any defaulter, was introduced to give a new and superadded right to the corporation, which was not incident to their nature. It was a cumulative remedy. But this does not abrogate their inherent right to sue on all contracts made with them. A lessor may have a *remedy on his covenant, without losing his right of distraining, or re-entry. So that possessing one remedy, is no argument for losing all others. The order made by the company, is stated according to the only manner in which it was possible to have been made; that is, by the president and directors. They were the constituted agents of the company, and to state their acts in the line of that agency, is to state the acts of the company.

†*English* v. *Burnell and Ingham.*

‡ *Bull* v. *Steward.*

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Harison, in reply. The act furnishes no one word to authorize the idea that the subscriptions are recoverable by suit. In actions founded on statutes, the rule is, that where no remedy is given, the common law will interpose and afford one; but where the statute prescribes a remedy, no other can be resorted to. Saying the remedy is cumulative, is a violation of all principles. On the point of consideration it is manifest, that had *Jenkins* brought an action against the president, directors, and company, for his proportion of the toll, they might have replied the non-payment of the $10, and it would have been conclusive. If so, they were not bound to him, and consequently he was not bound to them. This, then, is a clear *nudum pactum*, *ex quo non oritur actio*. *Cooke* v. *Oxley*, already cited. Two acts were necessary; subscribing and paying. To take this case out of the general rule, it ought to be shown, that the shares vested by the subscription. *Latham* v. *Barber*, 6 *D.* & *E.* 67. Allowing however the contract to have been good, the judgment must be reversed; for the order set forth by the pleadings is not in conformity to the contract relied on. It is to pay according to the order of the president, directors, and company; the order is by the president and directors. If I engage to pay according to the order of *A.* and *B.* you must show that *A.* and *B.* made an order. If not, a defective title is shown, not an actual title defectively set forth. This is a fatal circumstance, and not cured by verdict. *Rushton* v. *Aspinall*. *Doug*. 679. 2 *Lev*. 152.† and the cases cited by the Attorney-General. The company have not pursued their power of making the order according to the words of the act. It is a delegated authority, and must be strictly pursued. *Fronting* v. *Small*, 2 Ld. *Raym*. 1408. 2 *Bac*. *Abr*. 7, 8. This also is conclusive against the judgments.

† *Wise* v. *Wise*.

LANSING, Chancellor. The first point to be determined, is, the class to which the act of the legislature, on which this
* 93 action *has been brought, is to be assigned; if a public act, every part of it is, in legal intendment, in the know-

ledge of the court, *as the general law of the land.* If a private act, it can only be so far attended to, as the parties, by their pleadings, have made it an object of judicial conusance. Amongst the *English* legal maxims, we find, *that every statute that concerns the king, and every statute that relates to all the subjects of the realm*, are public statutes. All highways, as contradistinguished from *private* ways, are common to all the people of the state, and concern them generally. A new creation of a highway, or a new modification of an ancient way, as in the case of a turnpike, does not affect the mode of using it generally. It is still a highway, in the preservation of which, all citizens are interested. It contributes essentially to their convenience. The toll is merely exactable for its construction, maintenance, and repair. In all other respects, the right of using it as a highway is unimpaired. The people of the state, who, in their collective capacity, have succeeded to the rights of sovereignty, are also entitled to the reversion, after the sums charged on the turnpike are satisfied. These considerations rather incline me to think that this statute ought to be considered as a public act; but, for the purpose of this argument, I do not suppose it necessary to be very nice, in discriminating between public and private acts. For, though it is true, that private acts must be specially pleaded, the plaintiffs in the court below, by their allegations, have so far placed the act, on which this action is founded, before the court, as to enable them to examine the statute, to discover whether the ground on which they relied can sustain their action. They have referred to the statute by its title, *which is the name or description given to it by its makers*, and though the plaintiff need not recite more of the statute than is necessary to support his action; and though it is laid down, that a misrecital, which does not go to the ground of the action, is helped after verdict by the statute of *jeofails;* yet it is requisite, that he should show that the ground of his action is consonant to the provisions of the statute, to which he

10 *Co.* 57. 4 *Rep.* 77. *Holman's* case. 8 *Rep.* 28. 138. *Hob.* 227.

6 *Mod* 62. *Mills* v. *Wilkins.*

Freeman, 428. *Shaftsbury* v. *Digby.* *Sty.* 231.

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has thus generally referred in pleading, and so far forth as it is material to show the ground of his action, he has given it the property of a public statute. This is clearly distinguishable from showing an exception by pleading. In that case the plaintiff only shows *his right of recovery generally, and the defendant must, by pleading, bring himself within the exception. In that case, the record will always consist with the statute. In the other, an action may be sustained, which, from a mere comparison of the record with the statute, will show a recovery without right. I mean now to consider, 1st. Whether the contract in question is a valid one? 2dly. Whether an action is sustainable by the defendants for the sums required from the stockholders? From the record it appears that commissioners were appointed by the statute to perform certain duties, particularly prescribed. They were to *receive* subscriptions, and *to receive*, for the benefit of the defendants, $10 on each share of the stock of their company. The plaintiff subscribed, but it does not appear that he paid. At the time these steps were taken, *the corporation*, described in the act, was not in existence. It was incapable of contracting. The acts to be performed by the commissioners were merely preparatory to its creation. To give effect to their acts, their power must be strictly pursued. They had no discretion, or latitude of action; their line of conduct was marked with the utmost precision. They were directed to exact from the persons, who were to be admitted members of the corporation, both *subscription and payment*, as a condition precedent to their admission. If they omitted either *to subscribe*, or *to pay*, they did not come within the terms of admission. If so, the bare act of subscription was wholly nugatory. The subscribers, who were to meet, could only constitute themselves such, within the intent of the statute, by a compliance with the terms prescribed by it. When the corporation was organized, the directors might dispense with the exaction of the first payment. But if they did so, there was no ground for ex-

tending the doctrine of relation to the transaction, so as to bring it within the rules applying to mutual contracts. For, if the doctrine of relation is to be applied, it will carry it to a period beyond the existence of the body politic with whom the contract is supposed to have been made. If the defendants had affirmed the contract, in all the time intermediate *the affirmance and the subscription*, the contract had been suspended. Now, it is a well established rule, that, to give effect to mutual contracts, a unity of time, as to their commencement, so as to bind both parties from the same point *of time, is essential. It did not constitute a contract; for, the contract, if any, was, "I agree to pay $25 for every share I acquire by this subscription," and *if none were acquired, none were to be paid for*. This result would render it unnecessary to examine the second point; but I shall cursorily remark, that if the subscription was efficient in the first instance, I have no doubt but that the defendants might resort to their action, as a cumulative remedy, and that they had their election either to sue, or exact the forfeiture prescribed by the statute. This is an affirmative statute; it prescribes a form of contract, which, if so entered into as to bind the parties, at the time of consummation, without any aid from the statute by other express provision, would entitle the defendants to maintain their action. It is *a maxim* in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law. Therefore the plaintiff may either have his remedy by the common law, or upon the statute. For the reasons given, I am of opinion, that the judgment in this case ought to be reversed on the first point.

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2 *Inst.* 200.

L'Hommedieu, Senator. The act establishing this corporation directs, that every subscriber shall, at the time of subscribing, pay unto either of the commissioners the sum of ten dollars, for each share so subscribed. The material question in this case is, whether a subscriber, refusing to

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pay the money subscribed, is liable to an action for the money subscribed; or whether forfeiture be not all the punishment. This act, being made for a particular purpose, ought to be strictly pursued; and as there is no remedy given, except the forfeiture, that forfeiture is the only thing the corporation can insist upon. In this case, the subscriber refused to pay the money the law declared should be paid at the time of subscribing. If this was not done, it was a *nudum pactum*, or void compact. The plaintiff, by this, forfeited his right to be a stockholder; and, in case the stock had rose, the company would have been under no obligation to have considered him as a stockholder. This is, I believe, the first instance of a suit's being brought on a subscription to a turnpike or canal corporation, on account of a refusal to pay the subscription money. This shows the general sense of the community, in respect to such subscriptions. Many instances of this kind in the
* 96 canal company, insurance *companies, banking companies, and others, have taken place; and if the doctrine of subscribers' being liable to pay up the shares in such navigation companies to which they have been subscribed, be once entertained, it would be ruinous to many; contrary to the intent and meaning of the parties, and the obvious construction of the law. The determination of this court will settle the rule in regard to corporations which are formed, or similar ones which may be created, as to bringing suits on subscriptions. If the defendants are suffered to recover, it will open a wide door for numberless suits, if the corporations are disposed to bring them. By the contrary rule no inconvenience will accrue. In this case before us, we have no facts to show why the subscriber refused to pay the money subscribed by him. But whatever reason he had for his conduct, I am of opinion he had a right so to do, by the fair construction of the act; and that the judgment of the supreme court be reversed.

Judgment reversed, the court holding no action would lie.

Robert Furman, Appellant, and Jesse Coe, Samuel Coe, and William Coe, Respondents.

On a discovery of new evidence after a decree in chancery, the application ought to be for a bill of review, and not for a rehearing. When the competence of witnesses examined is the cause of application, it ought to be by bill of review; when their credit, by articles. If an executor or trustee be robbed of trust money, it is a good answer to a bill for an account. If the executor or trustee be dead, his personal representative may avail himself of it, though it want the corroboration of the oath of him whom he represents.

ON appeal from chancery. *Robert Coe*, the grandfather of the respondents, by his will empowered his executors, *William Furman and William Howard*, to sell and dispose of all his real and personal estate, *at such time as should be judged most advantageous for his children*. He directed also, *that his daughter Mary Coe's children* (the respondents) *should have the same quantity of money between them as their mother, the said Mary Coe, should have had for her portion, had she survived; that is, to be equal with the rest of his daughters, such share to be left in the hands of his executors, to bring them up*. On the death of the testator, *Howard* refusing to act, *William Furman* alone proved the will; and in pursuance of the authority it contained, being about to sell the estate of the testator, some of the legatees, who were of age, objected to it, urging, that, from the then existence of the revolutionary war, the land would sell to a great disadvantage; and that, as several robberies had been committed in the neighbourhood, the keeping *the money it might bring would be attended with danger; but that if a sale was to take place, it ought to be at auction, as in that manner a higher price would be obtained. The executor, however, without attending to these remonstrances, proceeded in the disposition of the real and personal estate of the testator, which he sold in the month of *May*, 1779, at private sale, for 3,158*l.* of which sum the real estate produced 3,000*l.* On the 3d of *August* following, the executor divided the money arising from the sale among the legatees, according to their interests under the will, and took from those who were of age a receipt in full, for all their shares and proportions respectively; but the part belonging to the respondents, the eldest of whom was not then six years old, he, according to the directions of the will, retained in his own hands. In 1783, *William Furman*, the executor,

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died, and the appellant, his son, having administered on his estate, the respondents filed their bill against him, for the recovery of their legacies, under the will of *Robert Coe*. To this the appellant put in his answer, insisting on a total exoneration, in consequence of his father's house having been broken open by some robbers, who took away all the money then in his father's possession, including that belonging to the respondents, no part of which had ever been recovered. On the examination of witnesses, the fair character of the executor and the robbery were fully established. The testimony of one witness went to show a recovery of the money, from an acknowledgment of the executor in conversation with him. It was also in evidence, that *William Furman* had refused to advance to *Susannah Coe*, with whom the respondents lived, any thing for their support, saying no person should have money from their legacies, until they should come of age. It appeared also, that *William Furman* had let out the real estate of his testator for two years. Upon these circumstances, the Chancellor had decreed to the respondents their full proportion of the real and personal estate of *Robert Coe*, without any deduction; and also their proportion of two years' rent of the real estate, with full interest on the whole, to be computed at the expiration of three months after the sale of the testator's property. After pronouncing this decree the appellant presented a petition for a rehearing, setting forth, that he had since discovered that two of the respondents' witnesses (whose depositions *were read at the hearing of the cause) were, at the time of their examination, interested in the event; and that one of the respondents died before the hearing, having bequeathed his interest under the will of *Robert Coe*, to the witnesses in question. The petition having been dismissed with costs, the appellant presented another for a rehearing, in which he stated that *Susannah Coe* had, with two of the respondents, resided on the real estate of the testator, from *May*, 1778, till it was sold; and that during the war it was very difficult to put money out at interest; that when it

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could be done, it was at a very low rate; and that, at no time from thence to the present day, had money been loaned at 7 *per cent.* This petition being also dismissed with costs, the appellant appealed, as well from the orders thereon, as the decree in the cause. *Bogert*, for the appellant, having opened the case, his Honor the Chancellor proceeded to assign his reasons:

Mr. *President*—Four questions have been discussed in this case, as material to a decision between the parties. 1st. Whether the sale of the real estate by the executor was *bonâ fide?* 2d. Whether the fund, destined to the support and education of the complainants, was inequitably withheld? 3d. Whether robbery can legally operate to discharge an executor? and, 4th. Whether the evidence of the robbery in the present case is competent to his discharge on that ground? The will vested a liberal discretion in the executors as to the time of sale. They were authorized to *sell the testator's real and personal estate, at such time* as should be most advantageous to the children of the testator. He died in 1777; the sale of the real estate took place in 1779. It is perhaps difficult, at this late day, to appreciate with accuracy the motives to the sale, at the time it took effect. It was at a period of great public commotion; when the operations of contending armies had affected the value of real estates very essentially; when that species of property, from the circumstances of the times, and the repeated depredations of lawless men, was, however, to be preferred, as a permanent fund for the support of persons incapable of managing their own concerns, to the less secure investment of money. These considerations it seems were fully brought into the view of the executor, by the representations of some of the persons *beneficially* interested under the provisions of the will; they were disregarded, *and the sale persisted in. * 99
Yet from a review of all the depositions, I think the rational result drawn from the whole collectively, is, that the testator's real estate was not sold much below its value.

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Several of the witnesses depose positively to this. Those who differ, either mention in indefinite termsthat it was sold below its value, or, if they define the sum, they connect the advanced price with a sale at auction, to which the executor was not bound to have recourse. This, combined with the circumstances that all the other devisees, capable of acting for themselves, immediately acquiesced, received their dividends of the consideration-money, and executed acquittances, I think, may well be admitted to close the examination as to this point; for, though their acts generally cannot operate to the prejudice of the complainants, *on this point*, they speak an unequivocal language as to the fairness of the sale, as they are not even suspected of collusion with the executor. As to the second point, this is important in one view of the subject. For, if the executor, regardless of the obligation he had incurred by taking upon himself the execution of the will, refused to provide for the support and education of the complainants, he may be chargeable for such breach of trust. The complainants have specifically charged this refusal in their bill, and the defendant, in his answer, avows his ignorance of any advance, for that purpose, by his intestate. The will directed that the shares of the complainants (*Mary's* children) should be left in the hands of the executor *to bring them up*. The children, all the witnesses examined to that point concur, were of a very tender age, at the time of the death of the testator. *Susannah Coe* swears that she brought them up; that she lived within two miles of the executor; that she several times called upon him for some portion of their share of their grandfather's estate, for their support and education; that he positively refused, without assigning any reason, to advance any till they arrived of age; that the complainants were in want of clothing, and other necessaries; that this was after the sale of the real estate, and after some of the devisees had been paid. *Robert Moore*, *John Moore*, *Hezekiah Field*, and *Sarah Leverick*, confirm the account of the infancy, destitute situation of the complainants, and their being supported by their

grandmother, aunt, or some other of their relations. The executor has been proved *to have sustained a fair character, by all the witnesses examined to that point; but the circumstances of his retaining the fund destined to support and educate the orphans, whose interests had been committo to his charge; of his observing them thrown upon the bounty of their relations, destitute of clothing, and in want of necessaries of life, and this, in direct violation of the trust he had undertaken, are calculated to throw an air of suspicion on the whole subsequent transaction; and, as far as part of the fund was necessary to be applied to their subsistence and education, it would clearly make him liable, whatever might be the consequences, of the robbery as to the residue. As to the third point; in 2 *Fonb.* 191. it is laid down as a result deduced from the cases bearing on this question, that if a trustee be robbed, the sum lost by the robbery shall be allowed him in account, although the amount be proved only *by his own oath.* To fortify this rule he cites the case of *Morly* and *Morly*, 2 *Ch. Cases*, 2. in which the robbery was proved, and the sum, by the *defendant's own oath.* In *Co. Litt.* 89. it is said, that if a guardian receive rent, and be robbed, if without his negligence and default, he shall be discharged. In *Southcote's* case in account, it was held to be a good plea before the auditors, that the defendant was robbed. In *Jones* v. *Lewis*, 2 *Vez.* 241. there is the same doctrine, as to robbery being a discharge of the executors, if properly proved. These cases establish the doctrine, that if an executor be robbed without his default, the robbery being proved, he shall, by his own oath, be permitted to ascertain the sum lost, and shall be discharged as to such sum. It is therefore only necessary to test the evidence in the present case by that rule. The authorities cited permit the defendant to adduce the evidence of the robbery, and by his own oath, to ascertain the extent of the loss; but it is certainly not a necessary consequence of this rule, that because a departing step has been taken from the strict line of evidence by admit-

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4 *Rep.* 84. *a.*

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ting the defendant's oath, in his exoneration; therefore it is necessary to continue a progress in the same direction, by taking his declaration, unsanctioned by oath, as part of the evidence. The defendant in this case has stated the robbery positively. But he has connected with it the information, that he was absent from *Long-Island* during the whole of the war beween the *United States* and *Great Britain*, and thus conclusively evinced, that

* 101 *the fact of the robbery was not asserted on his own knowledge of that circumstance, but collected from the information of others. That a robbery was committed, and some money stolen from the executors, seems to be pretty well established. The declarations of the executor, though contemporaneous, I think cannot be admitted as evidence; but if they could, those declarations are so inconsistent with each other, as, even admitting their validity generally to establish the point, to fail of that effect here. All the witnesses, however, speak of *his* declarations only, without any pretension to personal acquaintance with the circumstances of the robbery, excepting *Abigail Rhodes*, *Mary Boss*, *and Robert Drummond*, who were in the house of the executor on the night the robbery was committed; they also agree that the house was broken open by a party of men armed and disguised. *Abigail Rhodes* deposed, that 800*l.* or 900*l.* in cash was carried off, besides some articles of silver; that part of the money so carried off, "was money received of the estate of *Robert Coe*, deceased, and then in the hands of *William Furman*, senior, as executor of that estate." Upon her cross-examination she declares, "that some part of the money of which the said *William Furman* was robbed, belonged to himself, some to the brother of the said *William*, and that a considerable part belonged to the estate of *Robert Coe*, deceased; *that all the money of which the said William was robbed*, was kept in a strong *chest*, in an upper chamber, at the time of the said robbery; that the money was in gold and silver, and was contained in bags." She then proceeds to relate, that the executor was sent for

to *New-York*, to attend the trial of some soldiers for the robbery; that a purse containing sixty guineas was shown to him, and he was required to identify it, which he could not. *Mary Boss* deposes, that the party robbed the executor *of all the money in the house;* that she was present and saw the robbers carry off the bags containing the money. Upon her cross-examination she says, that the money of which the executor was robbed, was *kept in a chest in an upper room;* that it consisted of hard money, and was contained in bags; that she saw the robbers bring the said bags down stairs, and carry them away; that she knew not the quantity of money, having never seen it counted; that she was at that time employed by Mrs. *Furman* to spin. *Robert Drummond* *says, that the latter end of *September*, or beginning of *October*, 1779, when the robbery was committed, he lodged at the executor's; that he saw one of the robbers force open a chest, and take from it a bag; that another broke open a closet, and came out with three bags, which he supposed contained money, as it rattled; that the executor, after the robbers were gone, observed, that 300*l.* of the money belonged to some orphan children, of the name of *Coe; that he had offered the money to the relations of those children, telling them it was troublesome times, and that he did not wish to run any risk in keeping the money.* *Abigail Rhodes* particularizes the several owners of the money, and mentions the executor, his brother, and the estate of *Robert Coe*, as composing those owners; all this money she says was put in *bags*, in a *strong chest*, in an upper chamber. *Mary Boss* says they took *all* the money *in the house*, which she also says was in *a chest in an upper room*, and that it consisted of hard money, *and was* contained in bags. If all this money described by these two witnesses was in bags and contained in a chest, *Robert Drummond's* testimony shows, that the whole of the money from this chest was not taken; for he expressly declares, that only *one bag* was taken out of the chest, and three others from the closet; and as the chest contained money of three

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several persons, and probably in distinct parcels; from these depositions contrasted, it would appear, that though a bag of money was taken from the chest, it might not be the one containing the money of the complainants; these considerations, and the declaration of the executor deposed to by *John Moore*, that he had got it back again, and the one made by him, related by *Sarah Leverick*, *that some money had been left in every drawer*, superadded to which, the inconsistent declarations of the intestate at different times, show that it is totally impracticable to identify the money of the complainants in the hands of the executor, as the money stolen. Here the extraordinary interposition of the executor's oath might attach the loss to the fund in controversy; but without that, it is clear the discharge cannot be made out. I am therefore of opinion, that the defendant, who has admitted assets, is liable for the amount of the proportions of the complainants, and that it ought to be paid with interest, which is a very inadequate compensation for the privations which the complainants have *experienced by the non-application of the fund to their support and education. I take it, therefore, it must be referred to a master to settle the account, in doing which he ought to charge the defendant with the one-tenth part of the production of the real and personal estate of the testator; with these complainants one-seventh of the shares of *Elnathan* and *James*, with the one-fifth of *Aletta's* share, with interest on each sum from three months after the sale, deducting the money paid for her maintenance, with the share of the complainants in the personal estate of the testator, calculating the personal property at the selling, and not at the appraised value, and with the complainants' proportion of the two years rent of the testator's real estate with interest.

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Riggs, for the respondents. Before the counsel opens on behalf of the appellant, we shall state that it was agreed in the court below, that the suit should proceed, notwith-

standing the death of one of the respondents. That circumstance, however, was available of, only by way of bill of revivor,† and cannot be urged now, because in appeal, nothing can be insisted on which was not offered below. 1 *Har. Ch.* 454. We shall contend also, that rehearings are applications to the discretion of the court, similar to those for new trials; and that, as in the one case, a writ of error will not lie for a refusal, so an appeal cannot be maintained in the other, for dismissing. 3 *P. Wms.* 8.‡ And further, that if the appellant was entitled to any re-investigation below, it ought to have been sought by bill of review, and not by a petition for a rehearing. 1 *Har. Ch.* 450.

† It has been said that no defendant, nor any who represents him, can revive before decree signed and enrolled. *Glenham* v. *Statville*, 2 *Ch. Rep.* 195. See *Mitf. Treat.* 26, 27, 28.

‡ *Mills* v. *Banks.*

Bogert. On the first point made below, we have nothing to complain. The Chancellor's decision has put that at rest. But as to the interest with which we have been charged, we cannot be liable for it, unless it appear we have made the fund productive. It is in evidence it could not be put out, except with great difficulty; and allowing it could, it is settled an executor is not bound to do it. 2 *Fonb.* 184, 185.§ Besides, the executors were ordered to retain in their hands; whilst doing this, the robbery takes place, and this is from principle, as well as necessity, a full exoneration. 2 *Fonb.* 177, 178. 2 *Vez.* 240.¶ If the facts that a robbery was committed, and the money never recovered, were dubious, an issue ought to have been directed. To object, that the appellant's father did not prove the sum taken from him on oath, is *but of little force; for as at that time, and till his death, no courts were sitting, it was impossible to swear to that circumstance in any legal and efficacious manner. The appellant himself could not do it, but in the manner in which he has done, according to the best information and belief. It is only in case of gross neglect, an executor standing in the relation of trustee is ever made liable in chancery. 1 *Atk.* 430.† The

§ See the authority.

¶ *Jones* v. *Lewis.*

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† *Ivie* v. *Ivie.*

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proof against him must be very strong. 1 *Vern.* 144.‡ And that for fear of discouraging people from undertaking burthensome trusts. 2 *Ves.* jun. 37.§

Riggs and *Hoffman*, contra. In support of the decree we shall contend, that previous to the robbery, the executor was guilty of a most palpable breach of his trust, and so converted the fund; any subsequent loss, therefore, was of his own property, for which we were not to suffer. *Barnard*, 303.¶ 2 *Fonb.* 169. n. (b.)†† 4 *Ves.* jun. 620.‡‡ The very sale was in violation of his duty. It was at a time when property was low; and when even the product could not, as is stated by the answer of the appellant himself, be put out to interest; this too contrary to urgent remonstrances. In addition to these observations, the refusal to apply the portions of the respondents in bringing them up according to the directions of the will, was clearly a breach of trust, and a conversion of the fund *pro tanto*. This, upon the principle before laid down, renders the trustee answerable for the whole; and for this we have an authority in the case of *Le Guen* v. *Gouverneur & Kemble*§§ in this very court. As to the residue of the decree, we repose ourselves on the doctrines and reasons it contains.¶¶

Troup and *Benson*, in reply. If the court does not reverse *in toto*, they will at least order an issue to be directed. On the fact of robbery, there is no doubt. The only question is, as to the recovery of the money. If the proof of that is deficient, a jury is the proper tribunal, unless the court think it established that it was never regained. As to the case of *Le Guen* v. *Gouverneur & Kemble*, that turned on this point. The defendants refused to give the plaintiff an authority to re-

‡ *Palmer* v. *Jones.*

§ *Sammers* v. *Rickman.*

¶ *Vernon* v. *Vaudry.*

†† S. C. cited there, that a trustee who is guilty of a breach of trust, is liable to his *cestui que trust.*

‡‡ *Piety* v. *Stace.* A trustee using trust money in the funds, &c. shall be chargeable with interest. The demand, however, of the *cestui que trust*, is only a simple contract debt, unless acknowledged by the trustee under hand and seal. *Gifford* v. *Manley, Forest.* 109.

§§ 1 *Lex Mer. Amer.* 392.

¶¶ Both the counsel went into very elaborate and lengthy examinations of the testimony in the cause; but as the decision in the court below, and the opinions in this, contain the essence of the whole, to insert the ingenious arguments delivered, would not elucidate the point, how much soever they might evince the talents of the speakers.

ceive *his money, to which he was entitled, and which he did not claim, but subject to their *lien*, after deducting fully its amount. The cases are by no means parallel. By the decision of the Chancellor, interest is ordered, though the robbery is allowed. This is acknowledging the misfortune, yet inflicting a punishment; for interest is given against a trustee by way of mulct or penalty. In this respect, therefore, the decree is clearly wrong. So, in allowing the rents of the real estate for two years to be taken into the computation. Till the estate was sold, the rents† belonged to the heir at law; for to him the estate descended till the time of sale.

† The rule is, that where the real estate is to be sold at all events, and turned into personalty, the rents go as the land would. See *Cruse* v. *Barley*, 3 *P. Wms.* 20. and the note of Mr. *Cox*. But if the product of the land be to be divided between certain legatees, some of whom die during the life of the testator, a resulting trust will arise, as to their shares, in favour of the heir at law.

SPENCER, J. It is proper that I first consider, whether the proceedings on the petitions presented by the appellant for a rehearing of the cause, after a decree settling all the principles, and the dismissing those petitions, is warranted by the course of proceedings in the court of chancery. It appears to me, that the Chancellor disposed of those petitions correctly; for, as has been insisted on by the respondents' counsel, instead of asking a rehearing, on the discovery of new evidence, the application ought to have been for a bill of review, upon which the competency of the two witnesses, *Hezekiah Field* and *Susannah Coe*, would have been directly in issue. It was, however, not necessary to have filed articles; and in *Callaghan* v. *Rochfort*, 3 *Atk.* 643. Ld. *Hardwicke* decided, that articles were improper, when the objection was to the competency of the witnesses; but when to their credit, they were proper. The question as to the interest of money upon *Long-Island* during the war, was certainly a question to which the appellants examined witnesses; and it cannot, with any propriety, be pretended, that he discovered testimony as to the rate of interest, of which he had no knowledge before the passing of publication, or the decree. But, upon any grounds which may be assumed, as the application to the Chancellor was for a rehearing, in my opinion, the appellant's counsel mistook their remedy,

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and the Chancellor very properly dismissed the petitions. In making up my opinion, therefore, I have rejected all the exceptions to the testimony of the two witnesses, *Hezekiah Field* and *Susannah Coe*. The first question presenting itself, is, whether there is testimony enough to warrant the court in saying, there was a robbery? And, upon this head of the inquiry, without at all regarding *what *William Furman* said, there cannot remain a doubt. It is proved by the depositions of three witnesses, who were present at the time the robbery was perpetrated. *Abigail Rhode*, *Mary Boss*, and *Robert Drummond*, depose to the facts. They relate the circumstances, and agree in the principal occurrences more correctly than is common for three persons, who are deposing to an incident twenty-three years after it has happened. There can exist no reasonable ground on which to doubt the robbery. The Chancellor was impressed with its having taken place; and in truth, the respondents' counsel admitted it. The next important points of inquiry are, 1st. Whether the money which had been paid by Mr. *Titus* to the executor of *Robert Coe*, *William Furman*, and which appertained to the respondents, was part of the money whereof Mr. *Furman* was robbed? and, 2d. Whether this money was ever recovered by *Furman?* The law on the subject of bailments, and with respect to the responsibility of factors and trustees, is as firmly settled as on any other subject which can be presented. If the nature of the bailment or trust be such, that the bailee or trustee is to have no reward for his services, the law will not require of him any greater diligence than he usually exercises with regard to his own property; and it seems well established, "that if a trustee be robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the sum is only proved by his own oath; for he was to keep it as his own: so in case of a factor, for he cannot possibly have other proof." And it was correctly said on the argument, by one of the appellant's counsel, that it would be bringing an executor, in whom the testator reposes such especial confidence,

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2 *Fonb.* 181

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to a test too severe, when he has proved a robbery, to require of him an identification of the money belonging to the *cestui que trust*. Such severity would well nigh deter any man from assuming a station of such responsibility, upon the calls of friendship, and without any possible advantage to himself. It is objected, that *William Furman*, the executor of *Robert Coe*, never made oath, either as to the robbery, or to the identity of the money belonging to the respondents. It has been answered, and I think satisfactorily, that there is no mode pointed out for a trustee, under his situation, to have pursued. Had he made an affidavit, it would have been extrajudicial, *and of no more importance than his own declarations. He could not resort to a court of chancery; because, from the time of the robbery until very near the time of his death, which was in 1783, that court was shut. What means could he have pursued under the then state of things, which he did not? I confess myself at a loss to perceive any neglect on the part of *William Furman*, in that respect. If, then, *William Furman* could not avail himself of an opportunity to make the oath, which most certainly will, in cases of this kind, protect a person, as to the amount of the sum robbed, what shall we require of him that he did not do? It appears from the deposition of *Robert Drummond*, that immediately after the robbers had retired, *William Furman* went with him up stairs, where it is agreed, by all the witnesses, the money was deposited; and that he then stated to *Drummond* the amount to be 900*l.*; that 300*l.* belonged to some orphan children, of the name of *Coe;* and that he was an executor for the children. *Abigail Rhodes*, who, from her situation and relationship to *William Furman*, being his daughter, may be presumed to know, states in positive terms, "*that a part of the money of which* the said *William Furman* was robbed as aforesaid, was money received of the estate of *Robert Coe*, deceased, and then in the hands of the said *William Furman*, sen. as executor of that estate." *Mary Boss*, who is spoken of as *Polly Thompson*, also resided in the family of *William Fur-*

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man. She states, that he was robbed of all the money he had in the house; and that the next morning she heard him say, that all the money belonging to the grandchildren of *Robert Coe* was taken by the said robbers, together with his own. Mrs. *Rhodes* could only speak of the money belonging to the respondent; because, on the third of *August* before the robbery, the other legatees had been paid their proportions of the proceeds of the real and personal estate. It appears to me, that, from these facts, taken collectively, (and I know of nothing to detract from them,) it must be manifest, that the money belonging to the respondents, and in the hands of *William Furman*, was taken by the robbers, together with his own. Did *William Furman* recover this money? The only witness who establishes this fact is *John Moore*. His character appears to be fair; to his declaration, therefore, great weight is to be attached. He says, "that he heard **William Furman* say, he had been robbed of a certain sum of money, but that the robbery had been detected, and the money recovered; and that he had got the same again." To believe this to be correct, is also to believe *William Furman* to have been a most profligate and abandoned character. That he was otherwise, appears from the confidence reposed in him by *Robert Coe*, and the proof that he was a man of good character. It is to be again remembered, that *John Moore* is speaking to a conversation more than twenty years past; and it would be going too far, to believe that he did not labour under some mistake, when the testimony opposing this fact shall have been considered and weighed. If *William Furman* made the declaration imputed to him by *John Moore*, there can be no satisfactory reason assigned why it should have been confined to *Moore* alone; and most certainly his own family would have been informed of such singular good fortune. *Robert Drummond* states, that he was sent for to appear as a witness before the court-martial, on the apprehending some men charged with the robbery. He did appear, but could not identify the robbers, in consequence of which they were remanded; but he never heard or un-

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derstood, that the money, or any part of it, had been restored. This witness had the best means of knowing the fact of the recovery of the money, had it happened. This testimony, though negative, in my opinion affords a strong presumption that it never was reclaimed. *Abigail Rhodes* and *Mary Boss* both unite in declaring, that they never heard that any part of the money taken by the robbers had been recovered; and it is inconceivable, if the fact had been otherwise, that they should not have heard of it from Mr. *Furman*. *John Gosper* asserts, that he heard *Mary Boss*, some years afterwards, say, "that *William Furman* had been very lucky, for that he had recovered all the money he had been robbed of, except a small part." This declaration she denies ever having made; and, admitting that it detracts from her credibility, for having asserted facts not under oath, which she denies when under oath, still the testimony of *Drummond* and Mrs. *Rhodes* remains unimpeached. *Howard Furman*, who appears to have lived in the neighbourhood, heard of the robbery the day after it was committed, but never heard that the money was recovered. *Benjamin Coe* was told of the robbery *in 1783, by *William Furman;* and that he had been to * 109
New-York, on the apprehending some soldiers suspected, but he told him he could get no account of the matter. *Joseph Robinson* was told in 1783, by *William Furman*, of the robbery; and that it amounted to 900*l.* of which 500*l.* or 600*l.* belonged to him. He says nothing of its having been recovered. *Thomas Burroughs* says, he was informed by *William Furman* of the robbery; and that he had been sent for to *New-York* to fetch the money; but he did not fetch it, as the person having the charge of it had gone to *Kingsbridge*. *Susannah Coe* says, she has heard *William Furman* say he was robbed of a purse of money; that he had seen the purse and the money again in *New-York;* and that the person in whose charge it was, had gone to *Kingsbridge*. It is manifest that the last witness, to say the least of her, must have been mistaken; for, from the testi-

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mony of *Drummond* and the other witnesses, the money was in bags; and it is somewhat remarkable, that Mr. *Furman* could have seen the purse and money, when the person in whose charge it was, was absent at *Kingsbridge*. The testimony of *Joseph Burroughs* presents nothing but the vaguest hearsay, and deserves no consideration. Upon the whole, from the strictest examination of the evidence in my power, it appears to me, that the weight of evidence is decidedly in favour of the appellant; that the money was not recovered: therefore I am for reversing the decree, and dismissing the bill of the respondents with costs in that court. I have not noticed the pretended breach of trust, on the part of *William Furman*, in disposing of the real estate of *Robert Coe* at private, rather than public sale. The testimony in the cause abundantly shows that his conduct was fair and honest. If he really misjudged, in either the time or mode of selling, it will not warrant me in saying, contrary to the proof, that he was guilty of a breach of the trust reposed in him. There are other minor points in the cause, the decision of which is rendered unnecessary, by the opinion I have given. There is one thing yet to be noticed: it is alleged by *Susannah Coe*, that she applied to *William Furman* for money to purchase necessaries for the children, and that he refused, saying, "that no person should have money, on account of those legacies, until the children were of age." This, it has been contended, was a conversion of the whole; or, in other words, that he became answerable *for the whole amount in his hands, if it was afterwards robbed, and never recovered. The testimony of Mrs. *Coe*, on this point, is very loose and inconclusive. She furnishes no dates; and it is impossible to say, whether her application was before or after the robbery. But to this there is a further answer, that Mrs. *Coe* had no right to make the demand, unless she was guardian to the children, which she appears not to have been. Mr. *Furman's* refusal to an unauthorized person

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cannot, therefore, in law, draw after it the consequences which have been contended for.

LIVINGSTON, J. The questions in this cause are principally questions of fact. They involve the robbery of the intestate, and the subsequent recovery of the money. That *William Furman* was robbed, can admit of no doubt; the testimony to this point is full and conclusive. His honour the Chancellor regarded it in that light; nor can any who will read the depositions entertain a different opinion. The want of *Furman's* own oath (which indeed could not have been taken, except in an extrajudicial way) is abundantly supplied by other proof. There is as little difficulty in determining that the money of the complainants was taken, as well as his own. Some of the witnesses, who establish the robbery, expressly state that part of the money of which he was robbed belonged to the estate of *Robert Coe*, deceased. Considering the manner of the robbery, which was perpetrated in the night, by several armed men, who must of course have had a complete control over the dwelling-house and all its inhabitants, it is not probable they left any money, worth speaking of, behind. Whether the money was regained, is a question of more difficulty; and yet on the proof before us, my opinion would be in the negative. There is no one witness, except *John Moore*, who deposes affirmatively on this point; and although a man of character, it is probable either that he has committed some mistake, which would not be extraordinary, after so great a lapse of time, or that some circumstance is omitted, as to time and place, which would give a very different complexion to his testimony. Perhaps the declaration of *Furman*, which he speaks of, was made after he had heard of the detection of the robbers, and when he of course expected to recover the money. Some explanation is wanted from this witness, to reconcile his testimony with the declaration of the other witnesses, and the conduct of *Furman* to other persons. How *happens it, that none of the per- * 111

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sons who resided in his family ever heard this money was recovered, or that *Furman*, who bore the character of an honest man, never mentioned so important a circumstance to any but Mr. *Moore?* Or that the recovery of this money did not become a matter of as great, or indeed greater, notoriety in the neighbourhood, than the robbery? The money could not have been returned in secret. It would have been known to many; it would have been the subject of conversation throughout the neighbourhood; it would not have been in the power of an artful man to have suppressed a knowledge of such an incident. An honest man, as *Furman* was, would have had no motive to attempt it. But notwithstanding the strong inclination of my opinion in favour of the appellant on this point, it is one of those cases which ought to be submitted to a jury. A more full and satisfactory examination can thus take place, and there will be less danger of error in that way, than if we take the decision of it upon ourselves. My opinion therefore is, that his honour the Chancellor be ordered to direct a feigned issue to be tried between the parties at common law, to determine whether any and what part of the moneys of which *William Furman*, as executor to the last will and testament of *Robert Coe*, deceased, was robbed, during the late war between the *United States* and *Great Britain*, was at any time and when recovered by him; and that all further directions be reserved, until the trial of such issue. Some complaint was made against the sale of the real estate. This complaint was without cause. The Chancellor considered it so; and I entirely concur in this part of his opinion. The sale was fair, well intended, for a full value, and I think well-timed. Although money produced little or no interest on *Long-Island*, during the war, the farm would not have yielded any great rent, and might, and probably would have suffered much. It was also said that *William Furman*, by refusing to advance any money to *Susannah Coe*, for the complainants' support, was guilty of a breach of trust, and on the principle established in the

case of *Le Guen* v. *Gouverneur & Kemble*, he became liable, from that moment, for the whole fund in his hands, and that therefore no subsequent robbery could shield him from a responsibility to that extent. I cannot perceive how the case cited bears on the one under review. In *Le Guen* v. *Gouverneur** & *Kemble*, nothing more was decided, according to my understanding of it, than that factors, who were in advance, and under heavy responsibilities for their principal, had no lien on his securities in their hands, and that in a special action on the case against them for misconduct, it was not only unnecessary in the plaintiff to prove a special damage, but incompetent for the defendant to show their principal had been benefited by this alleged misconduct. If *Furman* was guilty of a breach of trust, it could only be for so much as was necessary for the support of these children; but that could not affect the surplus, which must have remained in his hands after advancing what *Susannah Coe* asked of him. It is however sufficient to say, that Mrs. *Coe* had no right to make this demand, and that it does not appear with sufficient certainty that it was made.

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In this last opinion KENT, J. concurred, contra LEWIS, C. J. who, with the majority of the court, being for a reversal, the decree was accordingly reversed *in toto*.

James Grant and others, *Appellants*,
And the President, Directors, and Company of the Bank of the United States, } *Respondents.*

James Grant, *Appellant*,
And James Bissett, Nathaniel Lawrence, Thomas Morton, the President, Directors, and Company of the Bank of the United States, Richardson Underhill, and Henry Remsen, } *Respondents.*

Registered mortgages must be paid off according to the dates of their registry. The doctrine of tacking does not apply between registered mortgages.

JAMES BISSETT, being seised in fee of four lots in the city of *New-York*, on the 10th of *May*, 1800, mortgaged to *Peter Onderdonk* in fee, three of them, for $1,125. On the 10th of the same month, this mortgage was duly registered, and shortly after fairly assigned to the president, directors and company of the bank of the *United States*, for a full consideration. On the 12th of *June*, 1800, *Bissett* mortgaged all

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*the four lots to *John Taylor*, in consideration of $2,500. This consideration was made up in the following manner: $506 cash paid to *Bissett*; $857 agreed to be laid out on the premises, and $1,147 in debts due to *Taylor* and others, assumed by him on account of the mortgagor. On the 27th of the same month of *June*, *Taylor* assigned the bond and mortgage to *Alexander M'Gregor*, who refunded to *Taylor* $476 he had paid to *Bissett*, and entered into the responsibilities *Taylor* had assumed, for the performance of which *M'Gregor* offered to give *Bissett* his bond. On the day following, the 28th, this mortgage also was duly registered. On the 2d of *July* following, *Bissett* mortgaged to the president, directors, and company of the bank of the *United States*, for $1,950, the three lots before mortgaged to *Onderdonk*, and they, on the same day, caused their mortgage to be duly registered. On the third of *June*, 1801, *M'Gregor* assigned to

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James Grant, the appellant, the mortgage to *Taylor*. After these transactions, *Bissett* becoming a bankrupt, the bank filed a bill in chancery against him, his assignees, *Taylor*, *M'Gregor*, the appellant, and several others of the mortgage and judgment creditors of *Bissett*, praying that they might be ordered to come in and redeem both the mortgage to *Onderdonk*, and that to the bank, or that the premises might be sold to discharge what was due upon them. To this bill *Grant* appeared and answered, insisting that as the *bonâ fide* holder, by assignment of the mortgage second in date and time of registering, he had a right to be paid out of the mortgaged premises next after the mortgage to *Onderdonk*. *Grant*, as assignee of the mortgage to *Taylor*, filed also his bill against *Bissett*, his assignees, the president, directors, and company of the bank of the *United States*, and other mortgage creditors of *Bissett*, praying that the lot of ground mortgaged to *Taylor*, and not included in the mortgage to *Onderdonk*, might be sold, and the proceeds applied exclusively to the discharge of *Taylor's* mortgage; and as to the other three lots, that they might be sold, and the money arising thereby, be appropriated in the first place to the payment of the mortgage to *Onderdonk*, and after satisfying the same, that the surplus should go to make up the deficiency, if any, which might arise in satisfying the mortgage to *Taylor*, by the sale of the fourth lot. To this latter bill all the defendants, except *the president, directors, and company of * 114
the bank of the *United States*, appeared, answered severally, and virtually disclaimed or submitted to the judgment of the court. The bank, however, answering under their common seal, alleged, that when they took their mortgage on the 2d of *July*, 1800, they had no notice of that to *Taylor*, and that holding the first mortgage in fee to *Onderdonk*, they had a right to insist on being first paid the amount of both securities. They also alleged fraud in *Taylor*, in procuring his mortgage from *Bissett*. Both causes being at issue, came on by consent together. In that by the bank of the *United States*, the complainants did not examine any

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witnesses. In that by *Grant*, he examined two witnesses, who were cross-examined by the bank, one of whom proved personal notice of the mortgage to *Taylor*, to one of the directors before the mortgage to the bank, and both proved the mortgage held by *Grant* to have been given for a full consideration. The only evidence to impeach this, was derived from an answer of one of the persons made a co-defendant with *Grant*, against the reading of which he strenuously objected. It was, however, decreed, that the bank should be first paid out of the proceeds of the sales of the three lots, the amount due on both the mortgages, held by them, before any part thereof should be applied to the satisfaction of the mortgage held by *Grant*, which it was decreed should not be deemed a valid security for the amount mentioned therein; but that it should be referred to a master, to inquire what part thereof had been actually advanced to, or for the use of *Bissett*, either by *Taylor* or *M'Gregor*, and that so much only as the master should find and report thus due, should be allowed and paid to *Grant*, in satisfaction of his mortgage, out of the proceeds of any of the mortgaged premises. These decrees being appealed from, his honour the Chancellor now assigned his reasons.

Mr. *President*—On this case, it will be necessary to determine, 1. In what order the mortgages in question are to be satisfied? 2dly. What ought to be the amount of satisfaction, as to the one executed to *Taylor*? As connected with the first question, *the right of tacking* has been denied; but our registering act, it appears to me, is not dissimilar in its provisions, and certainly similar in its object, to those referred to in the authorities cited. Both the *British* and our
* 115 *act are calculated to afford a test, to determine the priority of satisfaction, as relating to mortgages on the same subject, leaving all other legal and equitable consequences to attach, as if the registry had not existed. I take it, therefore, the doctrine of tacking has not been altered by our statute, requiring the registry of mortgages. The complainants, in

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their answer to the bill of the defendant, *Grant* expressly deny their knowledge of the existence of the mortgage to *Taylor*, and his deposition discloses no facts which can affect them with notice prior to the execution of the mortgage to them; for, though he deposes that he gave the information of the circumstances attending the taking of his mortgage to *Robert Lenox*, one of the directors, he does not ascertain the time otherwise than by declaring, that "*he thinks it was before the said president and directors had taken their mortgage.*" This is too vague and indeterminate, and hence it is not necessary to give an opinion on the question, whether the notice, if fully proved, was well given to a director? If the complainants had no notice of the existence of *Taylor's* mortgage, they are completely within the rules adopted by this court, on the subject *of tacking;* but it can app lyonly to the lots mortgaged to them, and the fourth lot must be exclusively appropriated to satisfy the mortgage to *Taylor;* but it appears that $857 79 cts. of the sum, for which it purports to have been given, were to be applied to the improvement of the mortgaged premises, and there is no evidence that it has been so applied: and it appears from the answers and depositions of the defendants, that this point, though that was not necessary, as they took their assignments subject to all equities, has been invariably attended to, in the several transmutations of the mortgage. Hence, there is not the least ground for permitting it to be retained by *Grant*, the assignee. It must, therefore, be referred to a master, to ascertain the amount due on the two mortgages to the complainants and *Onderdonk*, and the sum due on the mortgage executed to *Taylor;* but in making the statement on the latter, the sum of $857 79 cts. with the interest accrued thereon, must be deducted, unless it shall appear to the master that any part of that sum has been actually applied to finishing the houses erected on the mortgaged premises, in which case proper allowances must be made for the expenditure. The question of costs, and all

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other directions, *to be reserved, until the coming in of the master's report.

Riggs, for the appellant. We come before this court, insisting on the right of *James Grant*, as holder of a second mortgage, duly registered, to be satisfied in preference to a third mortgage, given and registered subsequent to the second, though such third mortgage is held by the same person who has a first mortgage, registered previous to our second. Against this right, the *English* doctrine of tacking is relied on. But with them there is no general register act, as with us. Their statutes on this subject are partial laws; and among the variety of decisions reported upon them, there is not one where the contest has been between two registered mortgages. It may not, however, be useless to examine how far, on the principles of the *British* adjudications, their rules will apply to, and support, the present decree. It is a maxim with them, that, if a first mortgage be purchased in, to aid a junior encumbrance, such first mortgage must be forfeited. 1 *Pow. on Mort.* 531. In the present case, the mortgage money was not payable before the end of the year, and the assignment to the bank was within four months. On this ground, therefore, the law is against the bank. There is also another. To enable a puisne mortgagee to tack, he must have lent his money without notice of the mesne encumbrances. 1 *Pow. on Mort.* 537. 3 *Atk.* 238.† 2 *Vern.* 271.‡ 2 *Fonb.* 301. n. (b). The evidence of notice to the bank is complete. Their denial not being upon oath, but under seal, cannot weigh against the testimony of *Taylor*, and is in itself an absolute nullity. For as a body corporate, having neither soul nor conscience, they cannot be sworn, and are not liable to be punished for perjury. Against them, therefore, and their denial, the evidence of one witness is sufficient, though, unaccompanied by circumstances, it might not avail against a natural person. Though the notice was not to the president, yet, being to a director, it is good pre-

† *Mead* v. Ld. *Orrery.*
‡ *Saunders* v. *Dehew.*

sumptive notice; and by such, a party is as much affected, as by actual intimation. 2 *Fonb.* 146 to 155. Besides, as our act is general,† the registering alone ought to be considered as notice. It is enough to set a person on inquiry, and that has always been held sufficient to affect with notice. 1 *D.* & *E.* 755.‡ With us, registering is like docketing of judgments, and that is invariably deemed to *make a purchaser take subject to the charge. Mr. *Powell*, in his treatise,§ does, we admit, state as his opinion, that the doctrine of tacking would be allowed between registered mortgages. It is, however, but his opinion, and that upon the operation of the 2 and 3 *Anne*, c. 4. and the 7 *Anne*, c. 20. But those statutes have not such words as our act. Our law says,¶ "In case of several mortgages of the same premises, or any part thereof, the mortgage or mortgages which shall be first registered, shall have preference in all courts of law and equity, according to the times of the registry of such mortgages respectively." If the decree complained of is permitted to stand, this part of the act is repealed. As to the sums actually advanced by *Taylor*, *M'Gregor* and *Grant*, if any investigation of them was to take place, it ought to have been by examination of witnesses, and not before the master; besides, it is sworn that they were to the full value, and against this the answer of a co-defendant could not be read; for there is no rule better established, than that the answer of one defendant shall not be read against another.** 2 *Ves.* jun. 11.†† 2 *Atk.* 303.‡‡ *Ibid.* 39.§§

† In *Collet* v. *De Golls* and *Ward*, *Forrest.* 65. it was ruled, that the publication in the *Gazette* of the issuing a commission of bankrupt, is notice to all the world, because such as is prescribed by an act of parliament, in which the assent of all is implied.

‡ *Goodtitle* v. *Morgan*.

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¶ 1 *Rev. Laws*, 481. sec. 2.

Van Vechten, for the respondents. It is a settled principle, that where equitable and legal titles unite, they shall overbalance those which are merely equitable. For the equities being equal, neither the one nor the other has, on the score of conscience, any claim to a preference over the other; there can then exist no kind of reason for disturbing or taking away the legal rights and estate of the other. The courts have, therefore, always left the party having

** Where the defendant professes not to recollect, but states that another defendant knows the fact, the answer of the defendant thus referred to may be read against him. 1 *P. Wms.* 300.

†† *Jones* v. *Turberville*.

‡‡ *Lockwood* v. *Ewer*.

§§ *Hill* v. *Adams*.

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both the legal and equitable estate, in full possession of his rights. 2 *Pow. on Mort.* 636 to 644. Wherever legal and equitable estates meet, the union is held to destroy all mesne equities. *Stra.* 240.† From these positions has been derived the doctrine of tacking. The act does not vary the law on this point. It orders, that they shall be paid according to the dates of their registering, that is, where there is only a set of successive encumbrances regularly appearing. But it does not prevent attaching to the first registered mortgage subsequent rights, which enable the puisne mortgagee to protect his estate, by that which he acquires. For as the act is meant to operate only between registered and unregistered mortgages, when all are registered, they stand as if the act had never passed. The puisne mortgagee *has, by his diligence, acquired a preference. If the registering is to be notice, then the second mortgagee has been guilty of a *laches*, in not purchasing in the first mortgage, to protect himself. Not having done so, we had a right to do it, and to cover our equitable, by *Onderdonk's* legal estate. The difference between the effect of general and particular statutes, is imaginary. The only actual one is, that under one, you must search in all cases; under the other, only in those arising within a specific county. The principles to regulate in each are the same, for the law is in both the same, though the limits within which it is to be applied are different. The notice relied on, was not given to the proper person; it ought to have been to the head of the corporation, the president. It is not, however, sufficiently alleged; it is merely "as he thinks." It ought to have been strongly evidenced, and such as to almost impute a fraud. 2 *Pow. on Mort.* 639. *Jolland* v. *Stainbridge*, 3 *Ves.* jun. 478. But, allowing all the force asserted to the provisions of our act, still it can never be contended, that they were meant, by merely registering, to protect fraud. It is in evidence, from the confessions of one of the defendants, that the full value for which the mortgage was given, has not been paid; and as *Grant*, in his answer, states his title to have been derived

† *Hagthaw* v. *Yates.*

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from *Taylor*, he refers to what *Taylor* says respecting that title, and makes his anwer evidence for the reasons in the anonymous case, in 1 *P. Wms.* 300.† and *Wyatt's Prac. Reg.* 75.

Hamilton, in reply. Allowing the doctrines of the other side to be correct, as to the reasons on which tacking has been introduced, and that the registering a mortgage is notice to the second mortgagee, it must equally be so to the third, and then a third mortgagee can never stand on equal equity with a second. This, therefore, subverts all the argument, as to the equal equity on which tacking is said partly to rest. But the decisions in *England* can never, on this subject, be applicable to cases here. The words of our law take them out of the operation of the *English* precedents. *They* proceed on the settled maxims of their courts. They are not directed or controlled by the statute law; for the 2d and 3d and the 7th of *Anne*, do not propose the regulation of registered securities. The act of our legislature was framed for the purpose of settling their priorities. Its object was to secure lenders of money. *This cannot be effected, if the construction on the other side prevail. A second mortgagee, after due search, may repose on the estate being adequate to the payment of his demand, and that of his senior encumbrancer; the very next day a cunning or colluding third person, lends a further sum, takes in the first mortgage, and cuts out the second. The principle of tacking encourages fraud; it supersedes that necessity of searching public offices, which ought always to be induced, when title deeds are not shown to the lender. This not being done, ought to lead to inquiry, the neglect of which is what the Lord Chancellor, in 1 *Eq. Cas.* 331. calls filthy negligence.‡ The express words of our law are our reliance. They destroy all that system of artificial reasoning, as to taking in the legal estate to protect the equitable; for, by the act, a priority at law is given to a second registered mortgage over a third; nay, it gives also *in terminis* a superior equity, and

† See *ante*, p. 117. note there **.

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‡ *Crassa negligentia.*

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this on equitable principles; for, where there is a law ordaining a registry to be made of mortgages, search and inquiry at the office is at least an equitable duty. As to the denial of notice by the bank, under their seal, it is enough to say, the only reason why an answer is evidence, is from being under oath. Whatever is not so, cannot be testimony, except as to records, and cases of confession. That there was not an original full valuable consideration from *Taylor*, allowing it to be so, is nothing to *Grant;* for a transferable security, though, in its origin made on a less consideration than it purports, becomes, in the hands of a *bonâ fide* assignee, operative to its full amount. Even fraud, except where positive law creates the security, is, by a fair assignment, for full and valuable consideration, purged, so far as it respects the assignee. The inquiry, therefore, into the sums advanced by *Taylor* and *M'Gregor*, is not to be supported. The nature of the considerations cannot be questioned. Money paid, money to be laid out, and assumptions of debts—both law and equity must, and do, allow their validity. On every ground, therefore, we contend the decree must be reversed.

Spencer, J. The Chancellor has adopted the rule of the court of chancery in *England*, which is, that where parties have equal equity, and one of them has a legal advantage, not to deprive the one of the legal preference he has obtained. That this rule is established there, I fully agree; and, unless our statute has created a rule on this subject peculiar to our
* 120 *own jurisprudence, I shall acquiesce in this part of the decision. For, I do not think that the registering the mortgage is upon legal principles notice of its existence; though, were the point now for the first time to be decided, I should concur that it ought so to be considered; the contrary, however, is too well established to be drawn in question. Nor do I consider the notice given by Mr. *Taylor* to *Robert Lenox*, either actual or constructive notice. It is left quite uncertain at what period this notice was in fact given; and, if

given in time, it does not appear that Mr. *Lenox* was present, when *Bissett* became indebted to the bank, or gave the mortgage, or that Mr. *Lenox* ever communicated it to the board. They deny such notice by their answer; and, although it, is not, nor could it be under oath, yet it is certainly sufficient to repel the vague testimony of Mr. *Taylor*. This brings me to the consideration of our statute concerning mortgages. It provides, that, "in case of several mortgages of the same premises, or any part thereof, the mortgage or mortgages, which shall be first registered, shall have preference in all courts of law and equity, according to the times of the registry of such mortgages respectively." It appears to me, that the statute has abolished, with respect to registered mortgages, the right of tacking a junior to a senior mortgage, and thus excluding an intervening one. They are to have preference in all courts of law and equity, according to the times of their respective registry. To allow a junior mortgage to be paid first, is denying to an elder mortgage the preference the statute has given. The statutes of 2d and 3d *Anne*, c. 4. and 7th *Anne*, c. 20. though affording a preference to registered over unregistered mortgages, do not determine, as our statute does, the preference they are to have, or in what order registered mortgages are to be redeemed or satisfied. Though it was truly observed by the appellants' counsel, that there are no decisions in *England* to be met with, denying the principle now advanced. I am, therefore, of opinion, that in this respect, the decree of his honour the Chancellor ought to be reversed. The remaining question is, whether the mortgage held by *Grant* is to be considered a valid security, for the amount therein mentioned, and thereby secured? It will be proper, first, to consider, what is, and what is not evidence in the cause. In the bill filed by the bank against *Grant* and *others, *John Taylor* and *Alexander M'Gregor* are made co-defendants, and the respondents' counsel, considering some parts of their answers as operating in their favour, have dwelt upon the facts disclosed by them. I have no hesitation

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in saying, that the answer of one co-defendant is evidence neither for nor against the other. The authorities cited maintain this position. It appears from exhibits and testimony, that the consideration of the mortgage given by *Bissett* to *Taylor*, was money advanced by *Taylor* to *Bissett*, money owing by *Bissett*, and assumed to be paid by *Taylor*, and a balance of between 800 and $900, to be paid in finishing certain houses on lots included in the mortgage. It appears that *Taylor*, about the 20th of *June*, assumed debts, and became responsible to *Bissett's* creditors, to the amount of about $1,000, besides the sum advanced. It further appears, that *Alexander M'Gregor*, to whom the mortgage was assigned by *Taylor*, as a consideration for that assignment, refunded money to *Taylor*, which he advanced to *Bissett*, and also, for the purpose of securing a small demand he had against *Bissett* in his own right, and another, as administrator of one *Cunningham*, and also, in consideration of his becoming responsible to sundry persons, for claims which they had against *Bissett*. For the performance of the agreement thus made by *M'Gregor*, he executed his bond to *Taylor*, and he offered to *Bissett* to guaranty its fulfilment. Though the business was transacted loosely between *Bissett* and *Taylor*, it appears to me, there exists no pretence of fraud; and as to the validity of such consideration, I have as little doubt. Under these circumstances, the mortgage originally given to *Taylor*, was assigned to *Grant*. There is nothing tending to show that *Grant* did not advance the full amount of the consideration, if the answer of *M'Gregor* be not evidence, and that it is not, I have before said. I am of opinion, that the decree be reversed; that after applying the proceeds of the one lot, included in the mortgage to *Taylor* and not in the others, towards the satisfaction of the mortgage held by *Grant*, the proceeds of the sale of the three lots, after satisfying the principal and interest due on the mortgage to *Onderdonk*, and held by the bank, be applied to the satisfaction of the principal and interest of the mortgage held by *Grant*, con-

1 *P. Wms.* 300. 2 *Atk.* 303. *Ibid.* 39.

sidering the same as a valid security for the entire sum mentioned therein, and secured thereby.

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*The other judges and residue of the court concurring, the decree was unanimously reversed. LEWIS, C. J. however, observed, that he thought the mere registering a mortgage was notice to subsequent encumbrances.

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Marshall and William Jenkins, *Appellants*,
And Catherine De Groot, administratrix of Peter De Groot, } *Respondent.*

If one of three joint makers of a promissory note die solvent, and the two survivors be insolvent, equity will direct payment out of the assets of the deceased.

THIS was an appeal from chancery, in which the facts appeared to be these: *James Goslin*, jun. *John Goslin*, and *Peter De Groot*, made their joint promissory note for 133*l.* 1*s.* 2*d.* payable to the appellants four months after date. *Peter De Groot* died intestate. The appellants prosecuted the surviving makers of the note to judgment, issued into the county where they resided a *fi. fa.* which was returned *nulla bona*, and they have since become insolvent, but the respondent has sufficient assets from the intestate to satisfy the debt. The bill prayed that the respondent might be compelled to pay the demand, but on a general demurrer the Chancellor was pleased to dismiss the bill with costs, and thus assigned his reasons:

Mr. *President*—From the authorities cited on the argument, it abundantly appears, that courts of equity are not favourable to the common law doctrine of survivorship in cases of this kind, and that they have shown a disposition to avail themselves of circumstances to avoid its effects. Thus the words of a condition of a joint bond have been resorted to, for the purpose of eluding the operation of this strict rule of law. The application of the money borrowed to the concerns of a joint trade, and the obligor's drawing

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the bond himself *jointly*, have been admitted as circumstances to relax the operation of that rule; but none of the cases go the length of deciding that, *devested of circumstances*, the obligation of a joint contract is to attach, as well to the representatives of the dead, as to the survivor of the contracting parties. This case presents the naked facts of a *joint debt* and survivorship; and, I think, must be determined on the rule which obtains at law, and if so, the bill cannot be sustained. In giving this opinion, I regret that
* 123 the rule is so well established, as to *oblige me to conform to it. The inclination of my mind was to afford relief, if I could discover any principles which would bear me out in it; but, thinking as I do, respecting the legal principles governing this case, I dismissed the bill with costs.

☞ The respondent not appearing to argue the cause, it was heard *ex parte*.

Per Curiam delivered by THOMPSON, J. The facts stated in the bill are admitted by the demurrer to be true. The only question, therefore presented to the court, is whether, where three persons make a promissory note, one dies intestate, but solvent, and the two survivors become insolvent, the estate of the deceased can in equity be charged with the payment of the note? I have not been able to discover any principles of justice on which it can be exonerated. It is a rule applicable to proceedings in courts of law, that where two are jointly bound, and one dies, the survivor must be prosecuted, and an action cannot be maintained against the representatives of the deceased. This, however, is a rule controlling the remedy, and not determining the right. Courts of equity daily give relief where the remedy at law is extinguished. The three makers of this note, as to this transaction, are considered in the light of partners, and the consideration received by them was for the mutual benefit of them all; and although this consideration, whatever it might be, may survive, unless severed during the life-time

of the intestate, yet the survivors are considered, in equity, as the trustees for the representatives of the deceased, for his proportion. Rights claimed by, and injuries arising from, survivorship, are not viewed in a very favourable aspect, either at law or in equity. I have looked into the cases referred to by the appellants' counsel, which I think fully establish and warrant both the right and practice of courts of equity, giving relief in cases of this description. The survivors are insolvent. The deceased left assets sufficient to pay this and other just demands against his estate. The appellants are without remedy at law, and I see no reason why equity should not give relief. I am, therefore, of opinion, that the decree of his honour the Chancellor ought to be reversed.

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CASES

ARGUED AND DETERMINED

IN

THE COURT

FOR

THE TRIAL OF IMPEACHMENTS

AND

CORRECTION OF ERRORS

IN

THE STATE OF NEW-YORK,

IN FEBRUARY, 1805.

TO WHICH ARE ADDED

SOME OLD DECISIONS BOTH IN THAT AND THE SUPREME COURT.

VOL. II.

NEW-YORK:

Printed and Published by I. Riley.

1810.

DISTRICT OF NEW-YORK, *ss.*

BE IT REMEMBERED, That on the twelfth day of August in the thirty-second year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words and figures following, to wit:

"Cases argued and determined in the Court for the Trial of Impeachments and Correction of Errors in the State of New-York.—In February, 1805.—To which are added, some old Decisions both in that and the Supreme Court. Vol. II."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies "of maps, charts and books, to the authors and proprietors of such copies, "during the times therein mentioned;" and also to an act, entitled, "An "act, supplementary to an act, entitled, an act for the encouragement of "learning, by securing the copies of maps, charts and books, to the authors "and proprietors of such copies, during the times therein mentioned, and "extending the benefits thereof to the arts of designing, engraving and "etching historical and other prints."

EDWARD DUNSCOMB,
Clerk of the District of New-York.

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MOST of the decisions which follow the adjudications of 1805, *are cases often cited at the bar, and as often denied or disputed. To make known what they are, they are now published.*

CASES

ARGUED AND DETERMINED

IN THE

COURT FOR THE TRIAL OF IMPEACHMENTS

AND

CORRECTION OF ERRORS

IN THE

STATE OF NEW-YORK:

FEBRUARY TERM, 1805.

Daniel and Gulian Ludlow, Appellants,
against
Lewis Simond, Respondent.

ALBANY,
Feb. 1805.

D. & G. Ludlow
v.
Simond.

ON appeal from a decision of the Chancellor, dismissing the appellants' bill with costs.

The appellants, on the 11th of *March*, 1799, entered into an agreement with *Angier Marie Leremboure*, and the respondent, by which *Leremboure* was to load on board one or more vessels, such a quantity of tobacco and *Havanna* sugars, the former at 10 and a half and 11 cents *per lb.* the latter at 15 dollars 75 cents *per cwt.* for the brown, and 19 dollars for the white, as would form a capital of about 40,000 dollars, after deducting the drawback. The goods thus shipped, to be consigned, under a bill of lading, by *Daniel Ludlow & Co.* to Messrs. *Buildemaker & Co. their* correspondents at *Hamburgh*, to be sold for the *account and risk of *Leremboure*. *Ludlow & Co.* to furnish *Leremboure* with their notes, to order, for the above amount of 40,000

If a surety engage to make good the deficiency arising from a sale of goods at a given place, and consigned to the correspondent of the person to whom the security is given, who has the whole control of the adventure, a sale by the consignee at another place releases the surety. Though relief at law may be had, yet if it be doubtful, equity will retain the bill.

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dollars, payable, one half at four, and the other half at six months; each half to be divided in several parts, to be delivered so as to complete each particular shipment, and the amount to be fully insured by one of the insurance companies, or other respectable underwriters, of the city of *New-York*. For this, *Ludlow & Co.* to be allowed a commission of 2 1-2 *per cent.* on the invoices of the goods put on board. To secure to *Ludlow & Co.* the repayment of the 40,000 dollars, together with the above commission, *Leremboure* to assign the policies covering the shipments, and in case of the capture or loss of any, *Ludlow & Co.* to receive from the underwriters the amount of their subscriptions. Should this mode of reimbursement not take place, *Ludlow & Co.* were authorized to draw at 60 days sight on *London*, twenty days before their notes respectively became due, at the then current exchange, and to order the necessary remittances to be made by *Buildemaker & Co.* to their friends in *London*, or to whom they may value on, to meet their drafts; the remittances to be made at the risk of *Leremboure*, both as to the validity of the bills and solvability of the house in *London*, to whom the same might be made. *Ludlow & Co.* to be allowed a further commision of 1 1-4 *per cent.* on the amount of all bills they might draw. If the proceeds of *the sales at Hamburgh, so disposed of*, should not prove sufficient to reimburse *Ludlow & Co.* the amount of their several notes, together with interest on their advances, commissions, and all other *charges, *Leremboure* to make good the deficiency, so soon as ascertained, by giving his note to *Ludlow & Co.* payable at 60 days, the same to be endorsed by *Simond & Co.* who thereby agreed thereto, *Ludlow & Co.* obligating themselves, if the proceeds of the several shipments exceeded the amount due them, to pay the difference when in cash; the parties binding themselves to each other in the sum of 100,000 dollars for the due performance of the agreement, which was executed in the names of

* 3

DANIEL LUDLOW & Co. (L. S.)
A. M. LEREMBOURE, (L. S.)
L. SIMOND & Co. (L. S.)

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In pursuance of the above contract, *Ludlow & Co.* on the day of the agreement, furnished *Leremboure* with three notes for 3,000 dollars, two for 2,500 dollars, three for 2,000 dollars, payable in six months, and one for 2,697 dollars 99 cents, at four months; *Leremboure*, at the same time, assigning to them policies of assurance to the amount of 40,000 dollars on the cargoes of two ships loaded by him with sugar and tobacco, marked *D. L.* which were, by *Ludlow & Co.* consigned and ordered to be sold according to the terms of their engagement. On the 6th of *April* following, *Ludlow & Co.* gave *Leremboure* other notes, making up the sum of 36,431 dollars 88 cents.

The cargoes thus shipped, and consigned to *Buildemaker & Co.* at *Hamburgh*, arrived safe, but previous to their reaching that port, several great failures had taken place, which induced a very considerable change in the market. In consequence of this, **Buildemaker & Co.* without any direction from the appellants, sent the tobacco to *Rotterdam*, addressed to their own correspondent, *Roquette Buildemaker*, who, in *July*, 1800, sold it for about 14,126 dollars 85 cents net, which he paid over to *Ludlow & Co.* In the *October* following, the appellants, having ascertained the balance due, presented the accounts of the sales of the tobacco to *Leremboure*, who acknowledged they were right, but, as he was then insolvent and confined for debt, declined giving his note for the deficiency, though the appellants demanded it. Sixty-three days after this refusal, *Ludlow & Co.* called on the respondent, and requested him to pay the amount of the loss, which he refusing to do, they filed their bill against him and the respondent, setting forth the above facts, charging a combination to refuse giving the note, praying that the accounts between them and *Leremboure*, arising under the agreement, might be taken, that *Leremboure* and the respondent might be decreed to make good the deficiency or balance, and that they themselves might be decreed such other relief as their case might require.

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Simond put in his answer, stating, that without having any interest in the contract, or expecting to receive any benefit from it, he consented to become surety for *Leremboure*, and did, with him, execute the agreement in the name of *Lewis Simond & Co.* though, not having any partner, he himself was solely bound by the signature. The answer, also, admitted the facts as detailed, except as to the effect of the failures at *Hamburgh*, of which it stated his ignorance, but averred, that the reshipment of the tobacco for *Rotterdam*, and sale of it there, was without the consent *of *Leremboure* or himself; in consequence of which, *Leremboure* refused to give the note mentioned in the agreement, and he to pay or make good the deficiency, considering themselves released from all obligation to do the one or the other.

* 5

To establish the price of tobacco at *Hamburgh*, in the summer of 1799, *I. L. Steinbach* and *John H. Schmidt* were examined, but the first could prove nothing as to the point, and the latter, only that *Virginia* tobacco, at *Hamburgh*, was, from the month of *October*, 1799, to the end of the year, at 3*s.* 9*d.* to 4*s.* *Hamburgh* currency, *per lb.* that *Maryland* was higher, and that the price continued the same in 1800, but what it was in the summer of 1799 he could not tell.

To prove the execution of the agreement, *William M. Seton* and *Martin Hoffman* were examined, who deposed, that they saw "*Daniel Ludlow* and *Gulian Ludlow*, the complainants, and *Angier Marie Leremboure* and *Lewis Simond*, execute the contract."

The cause being heard, on the above admissions and testimony, his honour the Chancellor pronounced the decree, now appealed from, and thus assigned his reasons:

Mr. *President*—On this case several questions have been made, but a preliminary consideration is—

Whether the bill can be sustained in this court?

The informality in the execution of the contract, might, of itself, be sufficient to repel the allegation, that the matter

ALBANY, Feb. 1805.

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in the bill is not cognisable here, as it was determined while I was in the supreme court,† that an execution of a sealed instrument by one partner, *in the name of the firm, was invalid, and it was for that reason rejected as evidence. But in this case it is not necessary, nor do I mean to ground my opinion on that point, for there is another head of equity which must sustain the bill.

†*Becker* v. *Kirk*, *July term*, 1791.

* 6

The defendant, *Leremboure*, has refused to give his note, and it does not appear to me that any form of pleading at law, would enable the complainants to allege the not endorsing a note *which never was in existence*, as a breach of contract by the defendant *Simond*, or as cause of action in any other shape; the making of the note would there, as to the defendant *Simond*, be considered in the nature of a condition precedent; and if it could be made out in proof, that the not making it was the effect of fraud or collusion, it would, perhaps, not better the condition of the complainants, for it would then become one of the peculiar objects of the jurisdiction of this court, but there certainly could be no valid reason for coming here to account, as the accounting in this case can only be required from the complainants.

I, therefore, proceed to consider the questions applying to the merits; these are—

1st. Whether the agreement was a valid one, as the complainants are described as *Daniel Ludlow & Co.* and have executed it with one seal only?

2d. Whether the house of *Buildemaker & Co.* were the joint agents of both, or the agents of either exclusively?

3d. Whether the defendant *Simond* was an original party in interest in the contract, or only introduced as surety? and if as surety,

*4th. Whether the deviation from the terms of the contract in its execution, has not discharged him? and,

* 7

5th. It has been insisted, that as the defendant *Simond* is not liable at law, this court will not carry his responsibility beyond it.

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As to the first question, if the contract was invalid, as to the complainants, the consideration on the part of the defendants must have failed also, and of consequence it was insisted the whole transaction was nugatory.

To the contract appears the signature of "*Daniel Ludlow & Co.*" collectively, as one of the parties; both the complainants, however, were present, and the subscribing witnesses depose, that *both executed it.*

Whether this inference was drawn from the erroneous opinion, that the act of one copartner may bind the other in all cases, respecting their common concerns, *whether the act is with or without seal*, or whether they both actually and formally sealed and acknowledged the instrument as their act and deed, cannot be determined from the depositions: it is a fact proved that both executed it.

The signature of the contracting parties is in the ordinary and regular form; but it is not an essential part of the execution: the sealing and delivery are of its essence, and I know of no law which will prevent a plurality of parties from acknowledging one seal affixed to an instrument, as the seal of each party separately; for the mere recognition of a seal does not, in its modern use, amount to an exclusive appropriation, so as to prevent the other parties to the
* 8 instrument, *from using it as their own, for all the purposes of giving validity to the deed, to which it is affixed, as their act; but in this instance, whether the paper in question is considered as a deed, or depending upon the principles regulating simple contracts, will not vary its operation. Before it assumed the shape of a deed, and had the formalities attending its being constituted such attached to it, the contract had received a definite complexion. The terms had been arranged and precisely ascertained by the convention of the parties, and it would emphatically be entangling justice in the net of form to sustain an objection on that ground here, for the existence and terms of the contract are the only objects, as far as respects this point in contest between the parties; and that these were au-

thenticated with a greater degree of formality than the strict rules of law require, cannot certainly detract from the evidence of its existence.

It will be perceived, that I do not rely on the acts of the parties in its execution, which might, in all events, have a determining effect in one point of view. That I do not now mean to pursue.

As to the second question.

To determine this, it may be necessary to examine the general scope and object of the contract, and to review its different details.

The leading motives of the defendant *Leremboure*, seem to have been, to avail himself of the agency of the complainants, perhaps as a protection against the captures of belligerents, and the reduction of the premium of insurance, and certainly of their credit, to give him an earlier command of the funds, expected *to a rise from the consignments of his sugars and tobacco to *Hamburgh*, and on the part of the complainants, the receipt of the commission stipulated by the contract. * 9

The contract was so arranged, as to afford the complainants every reasonable security against ultimate loss, and much more so than could apply to ordinary commercial speculations, if the business was correctly managed, according to the directions contained in the contract.

It multiplied the guards against loss by reposing, first, on the responsibility of *Leremboure;* secondly, and principally, on the subject consigned; and thirdly, on the defendant *Simond*, whose ability to respond does not appear to be questioned.

The contract stipulates, that *Leremboure* shall put on board one or more vessels, tobacco and sugars, at *fixed prices*, to the amount of about 40,000 dollars; that those goods shall be consigned under bills of lading *of the complainants, to Buildemaker & Co. their correspondents at Hamburgh*, to be sold for the account and risk of the defendant *Leremboure;* that he shall insure them, and assign

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the policies of insurance to the complainants, who shall receive from the underwriters the amount of any losses which shall be applied to the reimbursement of the complainants.

The complainants agree to furnish their notes to the defendant *Leremboure*, to the amount of the several shipments, fully insured, one half payable in four, the other half in six months, and to pay any surplus which may remain, after they have been satisfied, to *Leremboure*.

* 10 *If the policies did not afford a means of reimbursement, then the complainants were authorized to draw, *twenty days before their notes became due*, at the then current exchange, at sixty days on *London*, and to *order the necessary remittances to be made by Buildemaker & Co.* to their friends in *London*, on whom they might value, to meet their drafts, for which the complainants were to receive an additional commission of one and one quarter *per cent.* on the amount of such drafts.

If the proceeds of the sales *at Hamburgh* should prove inadequate to reimburse the complainants, the *defendant Leremboure agreed to make good the deficiency* as soon as ascertained, by giving his note to the complainants, payable at sixty days, and then follows, "the same to be *endorsed by L. Simond & Co.* who hereby agree thereto."

The house of *Buildemaker & Co.* are described *as the correspondents of the complainants* at *Hamburgh;* the complainants are authorized to order the necessary remittances to be made by that house, to *London;* they were to consign the tobacco and sugars, which were particularly valued, under their (the complainants') names, to the same house; the policies were to be assigned to them; *Buildemaker & Co.* were to make a selection of a house in *London*, to which the remittance was to be made by them, from *Hamburgh*, though that remittance was to be made, both as to the validity of the bills and solvability of the house in *London*, at the risk of the defendant *Leremboure*.

All these are strong marks of a determination completely to devolve the control of the subject upon *the complainants, of a total abandonment of the right of interfering in the management of the fund, destined to secure the complainants against the responsibilities they might incur, until its disposition should have been effected; and after this was consummated, the defendant *Leremboure* was even to receive the surplus from the hands of the complainants, and not from *Buildemaker & Co.* to whom a resort must of course have been had, if they were the joint agents of the parties.

* 11

The description of *Buildemaker & Co. as correspondents* of the complainants, in mercantile language, is somewhat more forcible than in common parlance; it indicates persons with whom they were in the habit of doing business, and in this instance it can only have been introduced to show, that in the capacity of the correspondents or agents of the complainants, they were to be entrusted with the management of the concern.

If that were not the case, one of the links in the chain of security, which the complainants evidently intended to rely on, would have been effectually broken.

The assignment of the policies of insurance was intended to afford a fund for the complainants' indemnity, in case of loss *in transitu*. Upon the arrival of the subject at its destined port, it was to be committed to the *complainants' consignees*, at the risk and for the *ultimate* account of the defendant *Leremboure*, but *exclusively* subject to the disposition of the complainants; *for* they were authorized to order the proceeds *to be remitted to London*, and unless this could be done without the interruption or control *of the defendant *Leremboure*, the fund, on the credit of which the complainants had given their notes, might have been withdrawn, and none left to satisfy the bills which they were authorized to draw on that place.

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As to the third point.

The introduction to the contract is, "that *it is agreed between the subscribers;*" this comprised all the parties.

Every subsequent article, the last excepted, on the part of the defendant, is *exclusively* imposed on, or for the benefit of the defendant *Leremboure;* he is to ship the tobacco and sugars, which are to be sold for his account and risk; he is to assign the policies; he is to be at the risk of the remittances; he is to make good the deficiencies, and he is to receive the surplus, if any.

It has, therefore, notwithstanding this general introduction, a partitive effect; it contains a detail of the stipulations between the complainants and the defendant *Leremboure*, particularly prescribing the duties and obligations intended to be thereby imposed on each, and then, as a final clause, the defendant *Leremboure*, "agrees to make good the deficiency as soon as ascertained, by giving his note to *D. Ludlow & Co.* payable at sixty days, the same to be endorsed by *L. Simond & Co. who hereby agree thereto*," which is an additional *indicium* of the intent that the defendant *Simond*, should only be held to pay, if the defendant *Leremboure* did not. The relation of principal and surety is strongly inculcated from this circumstance, and the whole tenor of the contract appears to me to support the same *construction. I am therefore of opinion, that the defendant *Simond* is to be considered merely as a surety.

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This brings me to the fourth question.

It may tend to elucidate this point, to ascertain the time and place in which the acts, preparatory to the liability of the defendant *Simond*, were to be performed.

1. As to the time.

The contract bears date the 11th day of *March*, 1799; it contains no particular limitation when the shipments were to be made, but it seems, the tobacco and sugar were ready for exportation, as the notes were to be furnished when each particular shipment should be completed, one half

payable in four, the other half in six months. It appears that two different shipments were made on the 11th of *March*, (the date of the contract,) and the 6th of *April*, 1799, at which time the notes stipulated by the contract were given; the complainants by its terms were authorized to draw on *London*, at sixty days, *twenty days before the days whereon the notes* were limited to be paid, and to direct a remittance of the proceeds of the sales to be made from *Hamburgh* to *London*, to satisfy the bills drawn on the latter place; these shipments, on the data furnished by the contract, would authorize the complainants to draw, in the months of *June* and *August*, for the first, and in *July* and *September*, 1799, for the second, periods which, with the necessary allowance for the transmission of the bills and the sixty days at which they were to be drawn payable, are the criteria from which the intent of the parties, as *to the consummation of the transaction, is to be collected. * 14

As to the place.

The consignment was to be made *to Buildemaker & Co. at Hamburgh*, the proceeds of *the sales at Hamburgh*, are spoken of in another part of the contract; the remittance was to be made by *Buildemaker & Co.* to *London;* the shipments were made to *Hamburgh*, and the insurance limited to that place. All these circumstances pointed to *Hamburgh*, in its locality, for the conversion of the articles shipped, into money, and from which the remittance was to be made.

The time might vary according to circumstances, but an unwarrantable delay, though it might have promoted the advantage of the defendant *Leremboure*, if he had remained solvent, might be very prejudicial to the defendant *Simond*, who would thus be prevented from taking measures for his indemnity, which a sense of danger would have prompted, and instead of depending upon an insolvent, he might have been placed at least in a situation to struggle for a plank in the shipwreck. This he is now totally precluded from; it is therefore incumbent on the complainants to show that

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they have been so vigilant as not to subject him to loss by the non-execution, or delay in the execution of the powers which they had a right by the contract to exercise, and which it is of no consequence to the defendant *Simond*, whether delayed by the act of the complainants solely, or the joint act of the parties in interest, as the consent of one

* 15 or both could not vary his *situation, or the precise measures of his responsibility.

The sale of the 169 hogsheads of tobacco took place on the 3d of *July*, 1800, probably more than a year after its arrival at *Hamburgh*, for no part of the evidence ascertains the time of its arrival. During all this time the defendant *Simond*, was unapprized of the result of the speculation, and precluded from taking the necessary steps to protect himself from loss. So far as respects the place, there is a palpable departure from the terms of the contract, not even satisfactorily explained on the ground of its being advantageous, for the depositions to this point leave the subject where they found it; that of *Joachim Ludwig Steinbach*, does not touch the period during which the tobacco was at *Hamburgh* or *Rotterdam*, and that of *John H. Schmidt*, states the price of *Virginia* tobacco from the month of *October*, *eight months* after it was embarked for *Hamburgh*, from 3*s*. 3*d*. to 4*s*. *Hamburgh* currency, *per lb*. and though it has been admitted, that failures of great extent took place at *Hamburgh* about the time the tobacco in question arrived at that place, there is no proof of the influence of that circumstance, on the state of the market, nor any reason given why it should affect the tobacco and *not the sugars*.

Indeed, if the evidence given in this cause was apposite, it would show there was a market for tobacco in *Hamburgh*, and that the prevailing price at that place might or might not, according to the different constructions of which this indistinct evidence is susceptible, have been more than the sales ultimately made at *Rotterdam*.

* 16 *The consideration of loss occasioned by parting with money to the principal, in consequence of a reliance on a

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surety, is as valid and meritorious in all legal and equitable views, as a benefit or profit acquired by the surety personally, and as on the one hand the surety ought to be held, perhaps, with more or less strictness, according to circumstances, to his engagements; so, on the other, the surety's risk ought not to be increased, or his contract varied to his prejudice.

The latter of these positions has been repeatedly recognised in the *British* courts, and though most of the cases bearing on this point, were adjudged since the revolution, and so no authority here, the principles laid down in them as far as they are necessary to be applied to the present point; that a surety cannot be carried beyond his contract; that the contract made by the parties must be judged of, and not another substituted in its stead; that it cannot be varied without his consent, and that a surety for definite engagements shall not be extended to an indefinite one, appear to me correct.†

These must form solid grounds of equity, by which, if this cause is tested, there is no pretence for charging the defendant *Simond*.

† 2 *Term Rep.* 372. 7 *Term Rep.* 256. 2 *Brown's Ch. Ca.* 579. 2 *Vez.* jun. 540.

Here the defendant *Simond* became bound for a definite object to respond for deficiencies in sales made *at Hamburgh* in a reasonable time. The complainants seek to charge him for deficiencies arising on sales made at *Rotterdam* at a later period than the contract contemplated, a totally different mart, subject to a different government and laws, exposed to some additional risk, and certainly to additional expense, *from the change of place, and the inconvenience of a change of agents, not entrusted by the parties; for the accounts of sales are subscribed *Roquette Buildemaker*, and not by the firm of *Buildemaker & Co.*

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If it was proper to send the subject to *Rotterdam*, I know of no principle that could have restrained it from being sent to *London*, or even to *Canton*, in quest of a better market.

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Upon mature reflection, and a deliberate review of all the circumstances attending this case, I am strongly impressed with the opinion, that the defendant *Simond* is not chargeable, and that as to him, the complainants have not sustained their bill, and it must, therefore, be dismissed with costs.

Woodworth, Attorney-General, for the appellants. Before the merits of this case are approached, it may be necessary to establish that the suit was rightly commenced in the court of chancery, as the fit and proper tribunal. Equity has, in many instances, a concurrent jurisdiction with the common law, but it is invariably the *forum* to which recourse is to be had, wherever, upon the principles of universal justice, the interference of a court of judicature is "necessary to prevent a wrong, and the positive law is silent." 1 *Fonb.* 10. n. (*f*). In matters of account it has almost exclusive jurisdiction, and the mere circumstance of its being requisite to state one, has been held sufficient to warrant a bill. 2 *Eq. Cas. Abr.* 4. Here the basis of the notes to be given, was a balance that could be ascertained only by an account. Besides, the refusal of *Leremboure* to give
* 18 *the note *Simond* was to endorse, might be the result of combination and fraud, which chancery alone could discover, and relieve. Any suspicion of trick, deceit, and contrivance, is sufficient to give to chancery cognisance of the suit. 3 *Atk.* 654.† If there was any doubt hanging over the case, whether a court of law was adequate to all its emergencies, it would afford acknowledged reason for equitable interposition. 1 *Ves.* jun. 424.‡ It might have been made a question, how far the contract, being signed only by one of the appellants, and having but one seal affixed, could be enforced at law. But as it is proved to have been executed by both *Daniel and Gulian Ludlow*, this point cannot now be insisted on, as it is to be inferred they severally appropriated the same seal to themselves. This would be a valid execution by both. In *Ball* v. *Dunsterville*, 4 *D.* &

† *Le Neve* v. *Le Neve.*

‡ *Weymouth* v. *Boyer.*

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E. 313. a single seal used by one partner, with the assent of the other, in the name of both, was held obligatory on each. Allowing, however, that there was a remedy at law, that does not of itself oust chancery of jurisdiction. In *Billon* v. *Hyde*, 1 *Atk.* 128. a verdict, in an action for money had and received, was not deemed to preclude from a recurrence to equity; because the subject of discussion involved matters of contract and account. Nay, though the very reason assigned for going into chancery, be such as the chancellor himself would have allowed the benefit of at law, it does not prevent an application to equity; because it is possible the judge before whom offered, might be of a different opinion. *Burrows* v. *Jemimo*, 2 *Str.* 733. In mercantile transactions relating to agents and *factors, a concurrent jurisdiction has always been exercised. 3 *Black. Comm.* 437. So where a bond was lost, there was formerly no remedy but in chancery. 1 *Ch. Cas.* 77.† The law is otherwise now, but still relief may be sought as before; and as the present is, perhaps, a case of suretyship, equity is the most appropriate tribunal; for a surety, not liable at law, may be so there; as if his name be not mentioned in the body of an obligation which he has signed. *Crosby* v. *Middleton and others*, *Prec. in Chancery*, 309. So equity will in many cases set up against a surety, debts extinguished at law. *Skip* v. *Huey*, 3 *Atk.* 93. But however forcible the argument against the jurisdiction might have been, it is too late to urge it now. The respondent should have taken advantage of it *primo die*, by plea in abatement. He cannot avail himself of it, after answering and proceeding to a hearing; for by so doing, he has submitted to the jurisdiction. *Penn* v. *Lord Baltimore*, 1 *Vez.* 447. The merits are grounded chiefly on *Simond's* being but a surety. This, it may be observed, does not expressly appear, and as it is enforcing very strict rules to do away the effect of a contract, the *onus probandi* lay on the respondent. He should have substantiated this by witnesses; for by the instrument it is left in doubt, though it may be inferred. In-

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† *Underwood* v. *Staney.*

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ference, however, ought not to decide this question; it must turn on the construction of the agreement. The rule on this subject is, that the intent ought to govern. 1 *Fonb.* 427. 3 *Atk.* 136.† *Kaimes's Prin. of Eq.* 204. 239. To effectuate this, equity is more liberal than a court of law. 2 *Atk.* 581.‡ The security of the appellants, was the object of every part of the *contract. The moderate compensation they were to receive, is a proof of this. A commission of 2 1-2 *per cent.* could never be meant as an indemnity for any hazard whatsoever. The goods are to be sold *at the risk of Leremboure.* It was intended therefore, that no loss, resulting from the sale, should be thrown on the appellants. *Simond* assents to this, and guaranties against it. That the property should be sold at *Hamburgh*, was not of the essence of the contract. The goods were to be sent to *Hamburgh, to be sold*, and not to be sold *at Hamburgh.* It was too rigorous to say, that the agents there had not a discretionary power to send the consignment to a better market. Whatever was *bonâ fide* done, for the advantage of the principals, is to be protected. It is a mistake to imagine that *Buildemaker & Co.* were the exclusive agents of the appellants. The contract speaks the language of all the parties to it, and that says, the goods shall be sent to *Buildemaker & Co.* They were, therefore, as much the agents of the respondent, as of the appellants. *Leremboure* consents that they shall sell for him, and at his risk. What is this but constituting that house his agent, and with the approbation of *Simond?* If this fact be admitted, it is immaterial whether the agents were authorized to send the goods to *Rotterdam* or not, because it was then the act of the respondent. Allowing, however, that *Buildemaker & Co.* were the agents of the appellants only, and that they had no right to sell at any other place than *Hamburgh*, still the consequences insisted on would not follow. The utmost that could be claimed, would be a deduction adequate to the actual *loss sustained by the breach of duty. Here it is manifest from the account of sales, that there has been a gain by changing the

† *Smith* v. *Parkhurst.*
‡ *Bagshaw* v. *Spencer.*
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place of sale. Notwithstanding this, the respondent loudly insists, that because he is, from our management, liable to less than he would otherwise have had to pay, he is therefore responsible for nothing. Is this a defence to be endured in equity? It will never surely be urged, that from the period at which the sales took place, *Simond* is released. The contract limits no time, within which they were to be made. Where then is the authority for making it criminal to sell in one month more than in another? A suretyship not restrained within given periods, is not discharged by lapse of time. 1 *Bos. & Pull.* 419.† Should the court be of opinion, that the cause rests on the fact of the property not having sold for more at *Rotterdam* than it would have produced at *Hamburgh*, an inquiry may be directed on that point, in the same manner as in cases of accounts; it is not unusual to refer them to two merchants. *Gyles* v. *Wilcox*, 2 *Atk.* 144.

† *Peel* v. *Tatlock.*

Hoffman, *Henry*, *Van Vechten*, and *Edwards*, contra. The questions in this case ought to be considered without reference to *Leremboure*, whose acts are not to affect *Simond*, the only real respondent. He, it is evident, on viewing the contract, which is consistent throughout, could be no more than a surety. He has no kind of beneficial interest. Neither in profits nor in commissions does he participate. The only character in which he appears, is that of a guarantee against loss. He has only one solitary act to perform, that of making good any deficiency duly incurred, and legally ascertained. To constitute a man a surety, it is not necessary that in the instrument he should be *named as such. If, from its nature or condition, it can be collected, it is sufficient. *Lord Arlington* v. *Merricke*, 2 *Saund.* 411. and the authorities *in notis*. If, then, the respondent be a surety, of which there seems to be no doubt, he cannot, as all the court held in *Wils.* 539.‡ be bound beyond the strict letter of his contract. The same principle is acknowledged in 1 *D. & E.* 291. n. (*a*).§ Nor is it extended in equity;

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‡ *Wright* v. *Russel.*

§ *Barclay* v. *Lucas.*

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for it is there settled, that if not bound at law, a surety shall not be liable there. 1 *Vern.* 196.† 2 *Vern.* 393.‡ 2 *Ch. Cas.* 22.§ The reason of these cases is, that sureties have no beneficial interest. They merely exercise their bounty and good will, without consideration. The securities, therefore, into which they enter, stand on the same footing as voluntary conveyances, which are never helped in equity. 2 *Vent.* 365.¶ For, before that tribunal, the very motives on which they engage, render them, in all cases, favourites of the court. On this point, every authority cited is a proof. As to the case of *Skip* v. *Huey*,** that relates only to securities destroyed or lost, by fraud or accident. It does not warrant the extension of a security. And though *Crosby* v. *Middleton*†† seems to be against our positions, that case may well be doubted, for in 1 *Fonb.* 38. n. (*w*) it is queried, and *Sheffield* v. *Lord Castleton* is almost directly in opposition. As, then, *Simond* is only a surety, and sureties are never, even in equity, liable beyond the letter of their engagements, it will be now incumbent to show, what, by the letter of the present engagement, *Simond* contracted to perform, to make good such deficiency as should arise on the sales of the cargo *at *Hamburgh*. That was the spot at which they were to be made. It is reasonable that a mercantile man, should guaranty the proceeds of a sale at one market, who would, by no means, be responsible for the result at another. The insurances were made no further than to *Hamburgh*, and this alone evinces that the adventure was to be terminated there. The contract, therefore, was varied by sending the goods to *Rotterdam*. It transferred the property from a neutral port to that of a belligerent, and took it out of the security of one, to expose it to the various dangers of the other. This procedure extended, also, the period for which *Simond* was bound. It protracted to more than a year the concluding a speculation, the termination of which, by the words of the contract, was never contemplated to exceed six months. The respondent was, therefore, released. *Nisbet* v. *Smith*, 2 *Bro. Ch. Rep.*

† *Ratcliffe* v. *Graves.*
‡ *Sheffield* v. *Ld. Castleton.*
§ *Simpson* v. *Field.*
¶ *Bonham* v. *Newcomb.*
** 3 *Atk.* 93.
†† 3 *Ch. Rep.* 55.
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584. *Rees* v. *Berrington*, 2 *Ves.* jun. 542. Against this conclusion it is urged, that *Buildemaker & Co.* were the agents of *Simond*, at least of him and *Leremboure*, or, if not so, then of all parties; but, that they could not be considered as the exclusive representatives of the appellants. The object of the contract, and its various parts, show that *Buildemaker & Co.* were the agents of *Ludlow & Co.* alone; they were the correspondents of the *appellants;* the shipments were under *their* mark; they were consigned by *them;* the remittances to be according to *their* order; the accounts to be rendered to *them.* In short, *they* were to have the whole control of the adventure, and under *them Buildemaker & Co.* to act, unamenable to, and without any interference of, *Leremboure* or *Simond.* How then could *Buildemaker & Co.* be the agents of persons they never knew, *of principals by whom they were not to be directed, and to whom they were never to account? It follows, therefore, that they were exclusively the agents of the appellants, who, and not *Simond*, must bear the loss arising from sales made in violation of the contract. For, it was by the *Ludlows* that confidence was placed in *Buildemaker & Co.* and the rule in equity is, that "he who trusts most shall lose most." 3 *Atk.* 93.† Another reason, against the claim of the appellants, arises from the very manner in which *Simond* consented to be liable. He engaged to endorse such note as *Leremboure* should give for such deficiency as should be ascertained on sales at *Hamburgh.* Suppose a note had been given by *Leremboure*, and on the respondent's refusal to endorse, an action of covenant, which, indeed, is the true and only remedy, had been brought for the breach of contract, would not the plaintiff have been obliged to aver, that the sales were made at *Hamburgh*, the deficiency on such sales ascertained, and the making of the note? These various circumstances must, therefore, be deemed conditions precedent to the liability of *Simond;* and if so, he cannot be responsible till they are performed. For, where a condition is precedent, it must be shown to have been literally fulfilled. 7 *Rep.* 9

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† *Skip* v. *Huey.*

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to 11.† It admits of no equivalent, because it is *stricti juris*. 5 *Vin. Abr.* tit. *Condition*, 145. *pl.* 27. *Co. Litt.* 218. (*a*). Nothing can be argued from the acknowledgments of *Leremboure*, stated in the case. The contract of one man cannot be varied by the act of another. If I enter into a bond to pay such sum as *A.* shall, after 8 days' warning to appear, be condemned in, if *A.* appear without notice and be cast, my bond will not be forfeited. 7 *Mod.* 144.‡ On every point, therefore, supposing *the court below had cognisance of the matter, the decision was correct. But we contend, the appellants had no right to ask the interference of that tribunal, and that the dismissal of the bill, if improperly ordered on the grounds taken by the Chancellor, must now be directed, for want of jurisdiction. Redress was open at law, in an action for damages. There alone it ought to have been sought, and there every satisfaction might have been obtained. On the principle of account, the bill could never have been sustained; because of no privity in *Simond* with respect to any of the transactions. Nothing rested in his knowledge which he could disclose, and he, consequently, was not liable to be called to an account in chancery. *Com. Dig.* tit. *Chancery*, (2 A.) throughout. 2 *Fonb.* 182, 183. n. (*n*). 1 *Eq. Cas. Abr.* 5. n. (*n*) also. The concurrent jurisdiction of equity, in matters of account, arises only from the right to obtain a discovery, in which case, the bill is retained for the purpose of relief. 1 *Fonb.* 10. n. (*f*). But what discovery can be obtained from *Simond?* the prayer of the bill is, in fact, for damages; not for a specific execution, and carries, therefore, in itself, a convincing proof that the application ought to have been to another *forum*. The authorities cited to establish that it is now too late to urge any thing against the jurisdiction, only prove that when a defendant does not, in his answer, make the cognisance of the court a point, he waives it; not that he cannot urge it in his answer. A defendant may, in his answer, insist upon his law. 3 *P. Wms.* 95.† *Hinde*, 200.

† *Ughtred's* case.

‡ *Hargrave* v. *Rogers*, cited by *Holt*, Ch. J. in *Booth* v. *Johnson*.

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§ *Harris* v. *Ingledew*.

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P. Wms. 238.† The omission of a defendant, will not confer jurisdiction.

**Pendleton* and *Harison*, in reply. It is a principle of chancery, that, on a bill to account, both parties are actors, and, therefore, if *Ludlow & Co.* were alone to render one, still it would be a proper mode; for, it often happens that, from motives of prudence, a trustee has recourse to a settlement in equity. To form an adequate judgment on the present occasion, the situation in which the appellants stood must be considered. They, in truth, were only trustees for *Leremboure*, to be, at all events, guarantied against any loss from undertaking the office, and, with that view, *Simond* entered into the contract. Adopting, then, these ideas, we admit that the intent ought to govern in the exposition. But in making this exposition, it ought to be recollected that the contract, now before the court, and on which the liability of the respondent arises, was of a mercantile nature. A liberal construction, such as would be given to a will, is that which, it is presumed, it would be proper to adopt. The doctrine, then, of conditions precedent, must necessarily be exploded; nor, indeed, could it ever apply, except by overlooking the distinction between those conditions which lie in compensation, and those which do not. Viewing, then, this as a commercial transaction, in which the appellants became trustees, on consideration of being kept harmless, it follows that, if their conduct has been *bona fide*, they are entitled to the indemnity, on the faith of which they undertook the trust. The very essence of it was reimbursement for the notes they gave, or the bills they might draw. Any deficiency, however arising, was, if they were not in fault, to be made good. Suppose the property had been consumed by fire, in warehouses, at *Hamburgh*, must the appellants have borne the loss? Yet, *to this, and a hundred other equally gross results, would the reasoning on conditions precedent necessarily lead. It is a mistake to say, that *Buildemaker & Co.* were the exclu-

† *Wrotsley* v. *Bendish.*

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sive agents of the *Ludlows*. They were equally agents of the *cestui que trust*, being nominated, or assented to by all parties, for the purpose of carrying the contract into effect. But allowing the arguments against us, on this point, to be correct, who ever heard that a trustee was liable for the conduct of an agent, appointed *bona fide*, and within the limits of his authority? We deny, however, that these agents have been guilty of any misbehaviour. It is within the scope of an agent's power to change the place of sale. He is not bound to sell on the spot where the goods are consigned to him. He may transmit them to another market, and all that is required, in the exercise of this discretion, is, that it should not be at an unreasonable distance. In the present instance it was rightly done. There was no price to be obtained at *Hamburgh*. The recent failures, though they left a market, gave no *price;* for, between a market and a price, there is a wide difference. The former signifies a possibility of sale. The latter such a one as is adequate and beneficial. Sending to *Rotterdam* obtained a price, and *that* was a sufficient reason for the measure. No *mala fides* can be imputed. The contrary appears. Had any existed, a sale at *Hamburgh* to themselves, or friendly purchasers, would have enabled *Buildemaker & Co.* to avail themselves of the *Rotterdam* price for their own benefit. The counsel opposed to us, are not aware of the consequences which a denial of this discretion might induce. Suppose at *Rotterdam* a profit of 50,000 dollars; would
* 28 *Buildemaker & Co.* have been *entitled to retain it? Yet, on the argument of an indispensable obligation to sell at *Hamburgh*, the proceeds at *Rotterdam* ought to be theirs. For, if liable to make good a loss resulting from such sale, the profit must belong to them. The fact is, that *Hamburgh* was the contemplated, but not the stipulated, port. If, then, the place of sale was not restricted, still less so was the time. Nothing but inference can be used to establish such a position, and a surety is not, with all the leaning of courts in his favour, to be discharged from the letter

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of his contract by mere implication. If his responsibilities are not to be increased, his exemptions are not to be multiplied. But the words of the instrument, and its positive provisions, show an expectation of a possible lapse of time in winding up the adventure, far beyond that allowed by the opposite side. It is expressly agreed, that the appellants shall have interest on their advances. Now interest never runs till after the day of payment. On the other points we think enough has been shown in the opening, to warrant the reversal of the decree appealed from.

SPENCER, J. In the discussion of this cause, the counsel have rested their arguments on two principal points.

1st. Whether the court of chancery had jurisdiction of this cause?

2d. Whether the respondent *Simond* has, from the facts proved, been discharged from his responsibility on the contract entered into between the appellants, *Leremboure*, and himself?

I shall not enter into a particular consideration of the first question, because, it is immaterial, in the view I have taken of the subject, whether the court *of chancery had, * 29
or had not jurisdiction. I wish, however, to be explicitly understood as not subscribing to the proposition, that *that* court had cognizance of the cause on any of the grounds urged by the appellants' counsel; and did it rest solely on that point, the strong inclination of my opinion is, that the appellants' relief, if any they are entitled to, is at law.

It cannot be controverted, but that *Simond* is a surety, or guaranty for the performance of *Leremboure's* contract, so far forth as respects the endorsement of a note which the latter stipulated to give *Daniel Ludlow & Co.* for the deficiency of the proceeds of the sales of the goods mentioned in the contract. He is a surety merely, without the chance of reaping any benefit from the enterprise; he has no interest in the adventure, and does not appear to have been indemnified by any security for this gratuitous under-

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taking, and although it was suggested, that he might have been interested or secured, yet no facts appear in the case to warrant those suggestions, and the court are to judge *secundum allegata et probata.* I proceed, therefore, on the fact, that *Simond* was a surety, without any interest in the subject matter of the contract, and without any counter-security.

It has been correctly urged, that sureties are favourites of courts of equity, and that those courts will not bind them, where they are not strictly bound at law. It may, in the same sense, be said, that they are favourites of courts of law; and that there they will not be bound beyond the scope of their engagements. These maxims, if I may so call them, grow out of the consideration, that in the various transactions of life, men are liable to be called
* 30 on to render *acts of neighbourly kindness, without any interest or expectation of reward; that they are frequently called on to become bail, endorsors of notes, guarantees in various modes, and when, in such cases, the principal turns out to be insolvent, it becomes a question which of two innocent parties shall sustain a loss. Both courts of equity and law will cast the responsibility on the surety, if, by the *terms* of his engagement, he has assumed it; but neither of them will do this where he is not brought within the precise scope of his undertaking.

The authorities on this subject are very uniform; they speak a language not to be misunderstood, and, without detaining the court by an enumeration of them, I am fully justified, by those cited, in saying that, both in law and equity, contracts, involving the rights of sureties, will, so far as respects *them*, receive a more rigid and less liberal construction, than between the original contracting parties.

I shall not unnecessarily repeat the facts in this cause. The material ones are, that by the contract, subscribed by the respondent, it was stipulated, that *Leremboure* should put on board one or more vessels, tobacco and sugars at

certain fixed prices, of the value of 40,000 dollars. That these goods should be consigned, under bills of lading, to *Buildemaker & Co.* the appellants' correspondents at *Hamburgh*, to be sold for the account and risk of *Leremboure;* that he should insure them, and assign the policies to the appellants, who should receive from the underwriters the amount of the losses to reimburse themselves, the appellants stipulating to furnish their notes to *Leremboure* for the 40,000 dollars, payable, the one half *at four months, the other half at six months, and if the proceeds of the shipments should exceed the amount due the appellants, they were to be answerable to *Leremboure* for the difference when in cash.

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If the policies did not furnish a mode of reimbursement, then the appellants were authorized to draw at sixty days sight on *London*, twenty days before their notes respectively became due, at the then current exchange, and to order the necessary remittances to be made by *Buildemaker & Co.* at the risk of *Leremboure*, both as to the validity of the bills, and the solvency of the house in *London*, to whom the same should be made, and should the proceeds of the sales at *Hamburgh*, so disposed of, not prove sufficient to reimburse the appellants the amount of their several notes, together with what interest might be due them on their advances, their commissions, and all other charges attending the negotiation, *Leremboure* agreed to make good the deficiency, as soon as ascertained, by giving his note to the appellants payable at 60 days, *to be endorsed by the respondent, who agreed thereto.*

The shipments were made on the 11th of *March*, and the 6th of *April*, 1799, at which time the appellants gave their notes stipulated to be given by the contract. The cargoes shipped and consigned to *Buildemaker & Co.* arrived safe in the summer of that year. Previous to the arrival of the cargoes, a great change had taken place in the market at *Hamburgh*, and many failures had happened among the principal traders there. *Buildemaker & Co.* without any di-

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rections from the appellants, sent 219 hogsheads of tobacco to *Rotterdam*, where they were sold *in *December*, 1799, and the summer of 1800, in the name of the appellants. The proceeds of the sales were insufficient to reimburse the appellants the amount of their notes, with interest, commissions and charges, and for that deficiency the suit below was instituted against *Leremboure* and the respondent. It appears that, after the accounts had been received from *Buildemaker & Co.* the appellants presented them to *Leremboure*, who overlooked them, and said they were right, but that, having become insolvent, and being then confined for debt, he refused to give his note for the deficiency, and both he and the respondent refused, after the time had elapsed when such note, if given, would have become payable, to pay the appellants the balance, which the appellants claim to be 24,044 dollars 82 cents.

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The only proof of the price of tobacco at *Hamburgh*, is derived from the deposition of *John H. Schmidt*, who states, that the price of *Virginia* tobacco there, from the month of *October*, 1799, to the latter end of the year, was, from three and nine-pence to four shillings a pound, *Hamburgh* currency; but that he does not know the price in the summer of that year, although *Maryland* tobacco was considerably higher than *Virginia*, during that period. It would seem that the sending the tobacco to *Rotterdam* has saved those interested in the proceeds from 3,000 to 6,000 dollars, if the price at *Hamburgh*, in the summer of 1799, was not higher than in the fall of that year, and the year ensuing.

There is no proof in the cause, that, on account of the failures at *Hamburgh*, the tobacco was unsaleable; *on the contrary, it appears that the sugars were sold, and that in *October*, 1799, tobacco was saleable.

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From this state of facts arises the question, whether the respondent is to be holden responsible for the deficiency of the sales? and, in my opinion, he is not responsible. The contract he has entered into, obliges him to endorse *Lerem-*

boure's note for the deficiency of the proceeds of the sales at *Hamburgh*. The place of the sales is, in my conception, not only a condition precedent, but it enters into the substance of the contract. It may not appear, at first view, at all material where the sales were made, provided the goods were sold for the best price that could be obtained; but it will, on examination, appear extremely important to the respondent, that the sales should have been made at *Hamburgh*, rather than *Rotterdam*. Whether, however, this be or be not material, if *Hamburgh* was agreed by the contract to be the place of sale, then on principles, as applicable to sureties, the respondent is discharged.

That *Hamburgh* was the designated place of sale is manifest, not only from the words of the contract, but from its plain and evident meaning. The goods were consigned to *Buildemaker & Co.* to be sold; the consignment to this house, transacting business at *Hamburgh*, a great commercial city, imports, in itself, that the sales were to be there. The insurances extending no further than to *Hamburgh*, is still more demonstrative of the sense and understanding of the parties, that they were to go no further. The want of provision in the contract for any other market, and, above all, the express terms of the contract, whereby *the respondent engaged to endorse *Leremboure's* note for the deficiency of the proceeds of the sales at *Hamburgh*, leave, I think, not a particle of doubt on that subject. * 34

This case is, then, perfectly analogous to the case in 2 *Chan. Cas.* 22. where a bond was given by a principal and his surety, to pay such sum as *N. H.* a master in chancery, should report. The master agreed on died without making a report. The chancellor determined on the principle I have stated, that the surety, not being bound at law, should not be holden in equity.

The sales not having been made at *Hamburgh*, is, I think, matter of substance. I have observed already, that the appellants gave their notes on the 11th of *March*, and 6th of

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April, 1799. The first became payable the 14th of *July*, and the last the 9th of *October*, in that year. The appellants contemplated, beyond a doubt, to meet these notes by drafts on *London*, at sixty days sight, and for that purpose *Leremboure* authorized them to draw bills, twenty days before their notes respectively became due, and to order the necessary remittances to be made by *Buildemaker & Co.* to their friends in *London*, on whom they might value to meet their drafts. From this arrangement the respondent must have contemplated, when he entered into the contract, that the cargoes thus shipped were to be sold, so as to form a fund for the payment of the bills to be drawn by the appellants, and that the term of his responsibility would not be extended beyond the last of the year 1799. Instead of this, by the transportation of the goods to *Rotterdam*, the
* 35 period of his responsibility was enlarged to *the 30th of *September*, 1800, a time far beyond any ideas he could have formed from the provisions of the contract. Had it not been thus enlarged, and the goods been sold for the lowest possible price at *Hamburgh*, he might, for aught that appears, have secured himself before *Leremboure* became insolvent. As in the case of *Rees* v. *Berrington*, 2 *Ves.* jun. 543. so here, in the language of Lord *Loughborough*, "we cannot try the cause by inquiring what mischief it may have done; (*to send the goods to Rotterdam;*) for that would go into a variety of speculation, upon which no sound principle could be built."

To hold the respondent liable, notwithstanding the terms have not been complied with, on which alone his responsibility was to arise, would be substituting another contract in lieu of the one the parties have made. It is impossible to say, that a contract, agreeing to be responsible for the deficiency of the proceeds of sales at *Hamburgh*, ought to be construed to be a contract to be responsible for the deficiency of the proceeds of sales at *Rotterdam*.

It has been urged by the appellants' counsel, that *Buildemaker & Co.* were not exclusively their agents, and that they

acted without their directions, in sending the goods to *Rotterdam*, and that they had, by law, a right to send them to a neighbouring market for a better price.

It will not, I trust, be contended, that had the appellants ordered the goods to *Rotterdam*, in case a higher price could have been there obtained, that, then, the respondent would have been liable. If, in that case, all responsibility would have been gone, how can it alter the case, as respects the respondent, *by what means the goods were sent there? He had no control over them; and if his responsibility is extended beyond the terms of his contract, however hard the case may be as regards the appellants, it would be harder as respects him. If, by law, an agent receiving a consignment of goods to sell, may send them to another market, which I am not prepared to admit, then the appellants may be chargeable with negligence in not instructing *Buildemaker & Co.* to sell at *Hamburgh*. But if, as I incline to think, they could not, as consignees, have sent their goods to another market, they would, under the facts proved in this case, be responsible to the appellants, unless they have affirmed their acts, and thus concluded themselves. "A man may," says Chief Justice *Willes*, in his *Reports*, p. 407. "in many cases, either consider another as a wrongdoer, or a receiver of money for his use, as he thinks best, and most for his advantage." In this case, the appellants have, it appears to me, affirmed the acts of *Buildemaker & Co.* in selling the goods at *Rotterdam*, by receiving their accounts, and passing the proceeds of the sales there, to the credit of *Leremboure*. This fact appears by the accounts exhibited by the appellants. It then turns out to have been a sale at *Rotterdam*, contrary to the contract, assented to by matter *ex post facto* by the appellants, and this I consider another insuperable difficulty to their recovery.

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The amount in demand, and the learned and ingenious arguments submitted to the court, have induced all the research and examination in my power to bestow. The clear and decided result is, that the respondent is discharged from

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his responsibility on the *contract; and, although I perceive that the appellants have conducted themselves with perfect good faith; that the loss is, to them, a severe misfortune, I am unwilling to restore them their losses, by inflicting an injury on a man having a perfectly legal and meritorious defence. In my opinion, therefore, the decree of the Chancellor must be affirmed with costs to be taxed.

THOMPSON, J. This case naturally divides itself into two general subjects of inquiry: 1st. As it respects the remedy, whether, if any, it ought to be in a court of law, or in a court of equity? 2d. As it respects the rights of the parties.

The first may be considered, in some measure, as matter of form; the second as matter of substance; and although it might be deemed more correct, in point of order, to determine the right before the remedy, yet, as I shall examine both questions, not knowing the course that may be pursued by other members of the court, the order of examination becomes immaterial.

There are several grounds, I think, upon which the appellants had a right to go into equity for relief.

It is undoubtedly important to the ends of justice, that the boundary between the jurisdiction of courts of law and courts of equity, should be plainly marked and strictly pursued. Were, indeed, the present an attempt to overleap the boundaries heretofore established, it might present a different question; but that, I think, is not the case here. By the ancient rule, according to Lord *Coke*, 4 *Inst.* 84. the jurisdiction of the court of chancery was confined to frauds, accidents and trusts. So in 10 *Mod. Rep.* 1. *But that jurisdiction has been gradually extended, and *Fonblanque*, in the first volume, page 8. of his valuable treatise, observes, that the *English* courts of law are, equally with their courts of equity, chargeable with having extended their jurisdiction by the aid of fiction; and that if courts of equity, professing to proceed upon the ground of the party being re-

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mediless at law, to take cognisance of some matters, of which courts of law would now take cognisance, they will be found originally to have derived their jurisdiction from the narrow decisions of courts of law, and having once strictly possessed it, courts of law ought not to be at liberty at pleasure to deprive them of it. The jurisdiction, he again says, page 11. exercised by courts of equity may be considered, in some cases, as assistant to, in some, concurrent with, and in others, exclusive of, the jurisdiction of courts of common law.

Matters of account form one class of cases, wherein courts of law and equity exercise concurrent jurisdiction. *Blackstone*, 3 *Comm.* 437. lays it down as extending to *all* matters of account; and it is a subject, I think, over which the jurisdiction of a court of equity ought to receive a liberal construction, because, the mode of proceeding is more peculiarly adapted to a deliberate examination, and correct settlement. All parties in the present case, were interested in having the account stated. The result was the basis, upon which the respective rights, and responsibilities of the parties depended. The account being to be stated by the appellants themselves, cannot alter the question. The other party had a right to contest it, and the same examination might be involved *as if the defendants below had been called upon to account. In matters of account both parties are actors. 1 *P. Wms.* 363. Hence it is, that after a decree to account, a defendant may revive the suit; because, say the authorities, in such case the defendant is considered as an actor; for, until the account is taken, it is not known where the balance lies. Although the account, as stated, was admitted by *Leremboure*, it was not by *Simond.* * 39

The necessity of a discovery might originally have been the foundation of the jurisdiction of a court of chancery, in matters of account; still I cannot discover from authorities, that it is now restricted to cases of that description. *Mitford*, 111. says, that in matters of account, equity has a concurrent jurisdiction with courts of common law, in cases

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where no difficulty would have attended the proceeding in those courts. *S. P.* 3 *P. Wms.* 251. *n.* A. And I can see no good reason why a trustee, who is desirous of having his accounts settled, should not be at liberty to call the *cestui que trust* into a court of equity for that purpose.

There is another ground, I think, for sustaining the bill. *Leremboure* had refused to give his note for the deficiency, and it may be *doubtful*, whether a specific performance in this respect was not necessary for the purpose of charging *Simond.* If also, any fraud or collusion had been practised between them, it would, in a peculiar manner, be an object of chancery jurisdiction.

The transaction was complex, the remedy at law difficult. 1 *Stra.* 733. Mr. Justice *Buller*, when sitting for
* 40 the Lord *Chancellor*, in the case of *Weymouth* v. **Boyer*, 1 *Ves.* jun. 424. says, "we have the authority of Lord *Hardwicke*, that if a case be doubtful, or the remedy at law difficult, he would not pronounce against the jurisdiction of this court, and the same principle has been laid down by Lord *Bathurst.*" Matters of account are proper subjects for a court of equity. 1 *Atk.* 128. It does not follow, that because a court of law would give relief, a court of equity loses the concurrent jurisdiction, which it has in matters properly cognisable there. 3 *Bro. Ch. Ca.* 224. In *Wright* v. *Hunter*, 5 *Ves.* jun. 794. the master of the rolls says, "I would not lay it down, that because courts of law may entertain actions upon such subjects," (a case of contribution among partners,) "a party may not file a bill for contribution;" for though he thought the question more proper to be tried at law, the plaintiff was very well justified in coming there; "for," he adds, "this court has never given up its jurisdiction."

Independent, however, of the foregoing considerations, I am inclined to think the respondent comes too late with an objection to the jurisdiction of the court, he having answered, and contested the merits, the subject matter of the bill being within the jurisdiction of the court. This appears to

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me, to be a reasonable rule, and calculated to save expenses. It is a good general principle, that where a party objects to the jurisdiction of a court, he ought to do it at the earliest opportunity. I would not, however, be understood to extend this rule, to cases where the subject matter is not within the jurisdiction of the court. Baron *Gilbert*, in his *History and Practice of the Court of Chancery*, says, page 219. "where the common law *would give the same relief as a court of equity, there, if the defendant would deny the deed, and demur to the relief, the demurrer would be allowed; but if the defendant doth not demur to the relief, the court will decree for the plaintiff on the hearing, after the deed is properly proved; because the defendant admitted the jurisdiction by answering and putting it in issue, and not demurring." Again, page 51. "where a plaintiff goes into a court of equity, for damages, which are uncertain and not to be settled but by a jury, the defendant may demur to the relief after having first answered to the damages; because it is *alieni fori*, since the court cannot settle the damages." But this must be *ante litis contestationem;* for if he answers and contests with the plaintiff, he can take no advantage of it at the hearing; for he has submitted to the jurisdiction of the court, and the court will not try at law the *quantum* of damages by a feigned action. 1 *Vez.* 446. I am therefore of opinion, that the objection to the jurisdiction of the court was not well founded.

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But as the result of my opinion is with the respondent, it is of little moment, as it respects the present case, whether the appellants have resorted to the proper *forum* for redress or not.

The first question presented, on this part of the case, relates to the *execution* of the contract, on the part of the appellants. It purports to have been executed in the name of *Daniel Ludlow & Co.* being the name of a firm, composed of *Daniel & Gulian Ludlow.* The signature must necessarily have been written by one only of the company,

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and as it is a settled rule of law, that one partner cannot *bind his copartner by seal, it is contended that the contract is invalid. Had the execution been by one of the firm, without the assent of the other, the objection might be well grounded; but from the testimony, the fact appears otherwise. Two witnesses testify, that they saw *Daniel Ludlow* and *Gulian Ludlow* execute the contract. It is said, however, that this testimony is equivocal; that the witnesses intended probably to be understood that they executed it in the usual and ordinary mode, in the course of the partnership concerns, by one only of the company. This inference appears to me not warranted by the language of the witnesses. They speak of the parties individually, not as a company; and had not *Daniel Ludlow* and *Gulian Ludlow* both been present, and assented to the execution, the language of the witnesses doubtless would have been, that they saw the contract executed by the one, who subscribed the name of the company. The interrogatory part to the witnesses was, "did you or not, see *Daniel Ludlow* and *Gulian Ludlow* execute the deed?" Taking it for granted, from the evidence, that *Daniel* and *Gulian* were both present, and assented to the execution, and probably both acknowledged the seal, I think the contract well executed, according to the principles settled in Lord *Lovelace's* case, Sir *W. Jones*, 268. and *Ball* v. *Dunsterville*, 4 *D. & E.* 314.

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I shall next examine the character which the respondent *Simond* assumes in this contract. This becomes necessary; because, from the whole current of authorities, it is manifest, that where a party is charged as surety, he has a right to avail himself of a strict *and literal construction of his contract, in order to exonerate himself from responsibility.

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In examining this question, we have principally to resort to the contract itself. In expounding it, the cardinal rule is, that the intention of the parties ought to be sought after, and carried into effect, and to govern the construction,

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where, from the instrument itself, that intention can be discovered. In viewing the general nature and object of this contract, and the parties who were to be beneficially interested in the speculation, I can consider *Simond* in no other point of light, than in the character of a mere surety. It is the essence of a partnership transaction, that each partner should be entitled to the gain, as well as exposed to the loss resulting from the concern. That was not the case here, for it is expressly provided, that if the proceeds of the several shipments, shall exceed the amount due *Daniel Ludlow & Co.* it shall be paid to *Leremboure*. Every feature of the contract shows, that *Simond* was not concerned in interest. The shipments were to be made by *Leremboure*. The notes to purchase the cargoes were to be furnished to them. The sales were to be made on his account and at his risk. The policies of insurance were in his name, and by him to be assigned. The loss, if any, at the winding up of the speculation, to be borne by him; for the contract expressly states, that "*A. M. Leremboure* agrees to make good the deficiency when ascertained." The mode of doing it, however, was by giving his note, with *Simond's endorsement*. The appellants, in their bill, pray, "that the accounts between them, and the said *Leremboure*, arising under the said *agreement, may be taken and stated." Not that the accounts between them, and the said *Leremboure* and *Simond*, might be taken and stated, which would have been the prayer, had they conceived *Simond* beneficially concerned. In addition to this, *Simond*, in his answer, under oath, solemnly denies having any interest in the contract, and this is not contradicted, or in any manner rebutted, by the appellants.

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Simond, then, being considered a mere surety, it becomes necessary, in order to determine his liability, further to examine the contract, and see what was to be done by the parties respectively, for the purpose of determining how far each one has complied with his obligation imposed by the contract, and the law applicable to this case. There

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is no necessity, however, of minutely examining all the stipulations, contained in the agreement; no breach of them is alleged on either side. *Leremboure*, on his part, purchased and shipped the cargoes pursuant to his contract; caused them to be insured, and duly assigned the policies to the *Ludlows*. The *Ludlows*, on their part, furnished *Leremboure* with the means of purchasing these cargoes, and consigned the bills of lading, which were given to them, to *Buildemaker & Co.* their correspondents at *Hamburgh*, according to the stipulations of the said agreement. But the principal controversy relates to the time and place of selling these shipments; and whether, in that respect, there has been any *laches* on the part of the appellants, so as to take away their right of calling on the surety to make good the loss. Here I would premise, as it was made a topic of argument by the counsel, that I see no
* 45 ground for alleging fraud or *collusion, either against the complainants, or the respondent. But the case presents an honest struggle, to shift the burthen of a very heavy loss.

There is no time expressly limited by the contract, within which the shipments were to be disposed of; but from the other provisions in the agreement, I think the intention of the parties in that respect may easily be discovered. It is fairly to be presumed, that the complainants did not intend to advance cash, for the purchase of these cargoes; but only to lend their names and credit to *Leremboure*, for that purpose. The first shipment was made on the 11th of *March*, 1799. The notes furnished by the complainants of that date, payable in six months, according to the contract, would fall due the 14th of *September*, and those payable in four months, would fall due the 14th of *July*. The second shipment was on the 6th of *April*, 1799. The notes furnished of that date, payable in four months, would fall due the 9th of *August*. The amount of the complainants' notes, furnished to *Leremboure*, was 36,431 dollars 88 cents, which fell due in the proportion, and at the times

following, to wit, 2,697 dollars 99 cents, on the 14th of *July;* 13,733 dollars 89 cents, on the 9th of *August*, and 20,000 dollars on the 14th of *September*. According to the usual course of a voyage between *New-York* and *Hamburgh*, calculating on a ready market, the proceeds of these shipments would have been received in season to answer the complainants' engagements. This is fortified by the appellants' own showing, in the account current annexed to their bill of complaint. From that it appears, that they must, as early at least as the 16th of *July*, have received the certificate of the sugar's having been landed at *Hamburgh*, which was necessary to entitle them to the drawback. The sugar was shipped on the 6th of *April;* from that to the 16th of *July*, is but little more than three months. The appellants' notes were payable at four and six months, making an allowance for unforeseen delay. Hence I think it reasonable to conclude, that the appellants calculated to meet the payment of their notes, with the proceeds of these shipments, and that *Simond*, the surety, probably made the same calculation. In case *Daniel Ludlow & Co.* should not be reimbursed by the policies of insurance, they were authorized to draw for that purpose at sixty days' sight on *London*, twenty days before their notes respectively became due. According to these *data*, the last draft might have been made on the 24th of *August;* the answer to which, making very liberal allowances, would, probably, have been received here as early as *December*, at which time *Simond* had a right to calculate that the speculation would have been wound up, and the result of his responsibility known.

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The contract, I think, carries stronger internal evidence with respect to the place, than with respect to the time of sale. There can be but little doubt, but that the contemplated place of sale was at *Hamburgh*. The appellants stipulate to make the consignment to their correspondent at *Hamburgh*. That part of the contract providing for the deficiency, declares, that "should the proceeds of the sale

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at *Hamburgh*, not prove sufficient," &c. The vessel sailed for *Hamburgh*, and the insurance was for the same place. The last is a strong circumstance, showing the understanding of the parties, with respect to the place; because, the policies were to be assigned to the appellants *as security, which would altogether have failed, had a loss happened after the vessel left *Hamburgh*, on a voyage to another market.

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Another question for examination is, the relation in which *Buildemaker & Co.* must be considered as standing to the respective parties.

The object of the appellants manifestly was, to have the disposition of these shipments, and the proceeds, completely under their control and management. They themselves might be considered as trustees for *Leremboure*, with a *lien* upon the property, for their advances and commissions. It would not, however, have been in the power of *Leremboure* to have called the property out of their hands, or counteracted their orders, until such *lien* had been discharged. There is nothing in the transaction showing that *Buildemaker & Co.* knew any other persons than the appellants, were interested in the shipments. The bills of lading were in their names. The consignment made by them. They to order with respect to the remittances; and, in short, to have the uncontrolled direction for the purpose of reimbursing themselves. Under such circumstances, I can conceive *Buildemaker & Co.* in no other light than as the immediate agents of the appellants. It would be incongruous to consider them the agents of *Leremboure*, and still he to have had no control over them; and to have permitted him to have had any control, might have defeated the *Ludlows'* security in some measure. But admitting *Buildemaker & Co.* to have been the joint agents of the appellants and *Leremboure*, it cannot affect the rights of *Simond*. His liability could not be prolonged or increased without his assent.

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*In what respects, then, has there been a variance in the execution of this contract, from what may reasonably be supposed to have been the understanding and intention of the parties? I think there has been a deviation both with respect to time and place. The final winding up of the speculation has been prolonged from some time in *December*, 1799, to *September*, 1800; and the sales of the tobacco were at *Rotterdam* instead of *Hamburgh*. The appellants having the control over this property, in the characters of trustees for *Leremboure*, it was their duty to have made use of more diligence in the disposition of it; or if, from a change of circumstances at *Hamburgh*, any embarrassments were thrown in the way, *Leremboure* and his surety ought to have been apprized of it. The forbearance of a trustee, in not doing what it was his office to have done, shall, in no sort, prejudice the *cestui que trust*, since, at that rate, it would be in the power of trustees, either by not doing, or by delaying to do their duty, to affect the rights of other persons. 3 *P. Wms.* 215.† It is not reasonable to suppose the appellants were ignorant of the conduct of *Buildemaker & Co.* in sending the tobacco to *Rotterdam*. They had not been reimbursed for their advances; the proceeds of the tobacco, as well as the sugar, were to make the fund to which they were, in the first instance, to look for reimbursement. In addition to this, the account current, annexed to the appellants' bill, shows, I think conclusively, that they must have been apprized of it. They continue drawing, at different times, on *Buildemaker & Co.* until the 13th of *August*, 1799. They then stop, and no further draft is made until *September*, *1800. Why this delay? They were not reimbursed; they must have known the fund, first to be resorted to for that purpose, was not exhausted, or they would have called on *Leremboure* and *Simond* for the deficiency. They wait, however, for one whole year, and then draw upon *Buildemaker & Co.* for the proceeds of the tobacco. By this, I think, they affirm the conduct of *Buildemaker & Co.* in sending the tobacco

† *Lechmere* v. *Earl of Carlisle.*

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to *Rotterdam*, if it was unauthorized in the first instance. *Willes*, 407. It is unnecessary here to say, what ought to be the decision as between *Ludlows* and *Buildemaker & Co.* or between *Ludlows* and *Leremboure*. It appears to me, however, to be allowing agents a very considerable latitude of discretion to justify so material an alteration of the destination of a cargo, as from *Hamburgh* to *Rotterdam;* from a neutral to a belligerent port. Yet, where agents act in good faith, a very liberal construction ought to be given to their conduct. Very different rules prevail when the rights of sureties are involved; as against a surety the contract cannot be carried beyond the strict letter of it. 2 *D. & E.* 370. A party cannot oblige a surety to remain such, contrary to his consent, longer than the time first bargained for. 2 *Bro. Ch. Rep.* 582, 583. Delay granted to the principal will discharge the surety. 2 *Ves.* jun. 542. The engagement of *Simond* was definite, to wit, to endorse *Leremboure's* note for the deficiency of the proceeds of the shipments to reimburse *Ludlows*. This deficiency, however, to be ascertained, in the manner and within the time prescribed by the contract. This *Simond* had a right to demand. In the case of *Wright* v. *Russel*, 3 *Wils.* 359. the

* 50 court *said, "a surety ought not to be bound beyond the scope of his engagement. That courts of equity are favourable to sureties; for, where they are not strictly bound at law, a court of equity will not bind them." This doctrine was recognised, and very much approved of, by Lord *Kenyon*, in the case of *Myers* v. *Edge*, 7 *D. & E.* 256. Where any act has been done by the obligee, that may injure the surety, equity will discharge him from his liability. 4 *Ves.* jun. 833. In the present case, the appellants, by prolonging the winding up of this contract, exposed the surety to greater hazards, among which the insolvency of *Leremboure* was no inconsiderable one, as the result has shown. The case of *Simpson* and *Field*, 2 *Ch. Ca.* 22. is a strong one to show the rigid construction adopted by courts to protect sureties, and also that equity will not bind them

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farther than they would be bound at law. The case was shortly as follows: the defendant was bound, as surety, in a recognisance conditioned to pay what should be reported by *N. H.* a master named in the condition. The master died before the report was made, and, by the strict letter of the condition, the defendant was not suable at law, because the report was not made by the master named, but by another. The Lord Chancellor dismissed the bill, saying, the party is but a surety, and not bound at law. The same principle we find recognised in the cases of *Ratcliff* v. *James*, 1 *Vern.* 196. and *Sheffield* v. *Lord Castleton*, 2 *Vern.* 393. and numerous others that might be cited.

If the view which I have taken of the contract be correct, and the deduction made be warranted by the case, the respondent stands protected by a host of authorities. *However honest and upright the conduct of the appellants may have been, they are chargeable with such a deviation from the contract, and such a want of due diligence in winding up the speculation, as will, in judgment of law, exonerate the surety. I am, therefore, of opinion, that the decree of the court of chancery ought to be affirmed. * 51

Kent, Ch. J. In the discussion of this cause, two leading questions have been raised, both of which have been very elaborately and ably considered by counsel. The one question relates to the mode of seeking redress, and the other to the merits of the controversy. It is necessary that I should give each of them an examination, and this I shall do in the order in which they are stated.

The first question then is, whether the court below had jurisdiction of the cause?

I incline to the opinion, that the court had jurisdiction; 1st. Because matters of account were involved; 2d. Because the remedy, at law, was, at least, doubtful; 3d. Because the defendant, instead of demurring to the bill, submitted to the jurisdiction by putting in an answer to the merits.

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The bill stated, at large, the contract between the appellants and *Leremboure* and *Simond*, and the history of the commercial adventure which arose out of that contract. It then stated, that a considerable loss happened on the sales abroad, and that the accounts, relative to the transaction, were presented to *Leremboure*, who acknowledged them to be just, but refused to give his note as stipulated by the agreement, and that both he and *Simond* refused to pay to the appellants the balance due them on the contract. The bill *further stated, that difficulties would attend their proceeding at law, and prayed that the accounts respecting the transaction might be taken and stated, and the balance paid.

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These accounts embraced the whole process of the adventure, from its commencement to its conclusion, and, consequently, consisted of a variety of charges and credits. As, then, one material part of the cause depended on a settlement of accounts, I think it came properly within the cognisance of the court. Chancery has a concurrent jurisdiction with the courts of law in all matters of account. Whether this jurisdiction originally arose from the necessity of obtaining a discovery by the oath of the defendant, or, in order to prevent a multiplicity of suits, is, perhaps, not now material to inquire, since it has become well established in cases where that necessity does not exist, and where no difficulty would attend the remedy at law. *Mitf. Treatise*, 109, 110, 111. 3 *Black. Comm.* 437. The cognisance of all causes that lie in account, does, undoubtedly, give a very broad jurisdiction to the court of chancery, but the exercise of this jurisdiction has been found in practice so convenient and salutary, that it has long since, by general consent, rendered obsolete the common law remedy by a writ of account; and, although our statute prescribes minutely the mode of proceeding by that writ, I doubt whether there ever was an instance of such an action having been prosecuted to effect in this state. The settlement of accounts, if they are in any degree long or complex, is

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improper, if not impracticable for a jury. The statute, therefore, in the writ of account, provides, that the accounts shall be *submitted to auditors; and, indeed, when questions of account arise at law, in the common action of *assumpsit*, they are pretty generally taken from a jury, and submitted by the court to referees, which the courts are authorized to do, with or without the consent of the parties. * 53

I know not of any rule limiting the cognisance of the court of chancery to one species of accounts more than another; or to matters of accounts against persons in any particular relation. Its jurisdiction extends to all matters of account between individuals, in whatever relation they may stand to each other. In this it has no more than a concurrent jurisdiction with the courts of law; for the writ of account at law, is given by our statute, 1 *Rev. Laws*, 94. in all cases where one person is liable to account to another as guardian, bailiff, receiver, *or otherwise*, and this renders the writ more extensive than it was under the *English* law.

But it was objected upon the argument, that the appellants were in the light of factors or trustees coming into court to have their own accounts stated, and allowed against their principal. This, however, they may well do. In bills to account, both parties are considered as actors, or plaintiffs, and the defendant has the same advantage as if he had himself instituted the suit. *Done's case*, 1 *P. Wms.* 263. *Kent* v. *Kent*, *Prec. in Ch.* 197. A trustee may go into chancery to have an allowance made against his *cestui que trust*, out of trust moneys in his hands. Of this we have an instance in the case of *Gould* v. *Fleetwood*, 3 *P. Wms.* 251. *n.* (A). Guardians of great estates in *England*, are said to pass their accounts yearly in the court of chancery, and this is recommended *in *Wood's Inst.* 73. as a safe way to justify themselves, when the minor, at full age, shall call them to a general account. * 54

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Nor is it necessary that the responsibility of the defendant should be established before you can file a bill for an account. In most cases that responsibility, as well as the stating of the account, will be a point for litigation. It is sufficient that the cause will involve an account in case of the liability of the defendant. Both questions must be more or less connected together in every case; especially as to the extent of the engagement, and how far it will apply in particular instances.

It was said, however, that there were no accounts to state and settle in this cause, for the bill charges that *Leremboure* had admitted the accounts to be just. But the answer of *Leremboure* declares, he admitted them no further than as to the correctness of the calculations; and if he had, his admissions could not have concluded *Simond*, who would be entitled to have the accounts reliquidated, and the deficiency stated, before the court would oblige him to perform his part of the contract.

For these reasons, I think the suit below was properly instituted, and I should regret exceedingly, that any opinion which might be given by this court, should tend to embarrass the benign and well settled jurisdiction of chancery, in the unlimited cognisance of acccounts.

Another ground upon which the bill might be sustainable is, that the remedy at law was, at least, doubtful. This has been repeatedly held as sufficient to give the court of chancery jurisdiction. *Bilton* v. *Hyde*, 1 *Atk.* 128. 1 *Vez.* 331. *Burrows* v. *Jemimo.* *2 *Stra.* 733. 1 *Ves.* jun. 424.† The contract is susceptible of two constructions, upon one of which there was clearly no remedy at law. If we take the contract according to its grammatical construction, *Simond* was bound only to endorse the note that *Leremboure* should give for the deficiency, and the giving the note was a condition precedent to the obligation of *Simond.* It may be said, however, and that too with great force of argument, that unless *Simond* was bound that *Leremboure* should give the note, as well as that he should endorse it, the security

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† *Weymouth* v. *Boyer.*

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intended by the contract, would in a great degree vanish. If we assume the first construction, there would be no remedy for the appellants, without the aid of the court of chancery, for a suit at law would not lie for not endorsing a note which was never drawn. In such a case, the assistance of chancery would become essential, to compel the making of the note, or to reach the case of fraud or collusion between *Leremboure* and *Simond*, in not giving the note. The uncertainty, therefore, and the difficulty of an adequate legal remedy, was a sufficient reason for sustaining the bill.

It may be also a matter of doubt whether the contract was valid in its execution, as a sealed instrument or specialty. The proof indeed is, that the witnesses saw the appellants execute the contract, and if we are to understand them as meaning that both the appellants were actually present, and united in executing it, it was a good execution; for several persons *may* enter into an obligation and bind themselves by one seal. Lord *Lovelace's case*, *Sir W. Jones*, 268. *Ball* v. *Dunsterville*, 4 *D.* & *E.* 313. But it may be well doubted whether the witnesses *meant any thing more than that the appellants executed the deed, in the usual mercantile way, by one of them doing it in the name of the firm; for the appellants state in their bill, that they, or one of them, executed it, and that they supposed such execution to be unexceptionable. If the fact really was, that only one of the appellants executed the contract, it was not a good execution at law, and it was necessary to resort to equity, to try how far that informality in the execution might be corrected, as it was clearly founded in mistake. *Sheffield* v. *Lord Castleton and wife*, 2 *Vern.* 393. Chancery would not help a defective execution of a contract against a surety. *Crosby* v. *Middleton*, 3 *Ch. Rep.* 53. and *Prec. Chan.* 309. *contra*, from whence, in 1 *Fonb.* 37. the point is considered as doubtful.

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But admitting these grounds not to have been sufficient, in the first instance, to have sustained the bill, the respondent came too late to object to the jurisdiction of the court, after he had put in his answer to the merits of the cause. By answering in chief, instead of demurring, he submitted his defence to the cognisance of the court; and equity will, and ought, in such cases, to retain the cause, provided the court be competent to grant relief, and has jurisdiction of the subject matter, as it manifestly had in this case, the controversy being upon a matter of personal contract, and of account. *Billon* v. *Hyde*, 1 *Atk.* 128. 1 *Vez.* 331. 3 *Bro. Pa. Cas.* 525. *Mitford, passim. Gilbert's Treatise on Chan.* 51—53. 219, 220, 221. *Penn* v. *Lord Baltimore*, 1 *Vez.* 446, 447. This last reason why the cause was sustainable in the court below, appears to me to be supported on the firmest basis, both from the reason of the thing, and the weight of authorities.

* 57 *Having thus disposed of these preliminary or technical questions, as to the jurisdiction of the court, I proceed, secondly, to examine the merits of the case.

To perceive that *Simond* had no beneficial interest in the concern, and was but a mere naked surety for the performance of a specific act, requires only a bare perusal of the contract. The formal beginning and conclusion of the contract, do, indeed, seem to carry the agreement of the parties to the whole instrument; but we must examine the body and the scope of the agreement, to judge of its meaning and effect. On doing this, we shall immediately perceive, that the agreement of each party is to have reference only to such particular parts of the contract, as apply to him; *reddendo singula, singulis;* and as *Simond* was only a surety, it becomes important to consider and understand well, the principles of law, which are applicable to him in that character.

It is a well settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and, except in certain cases of accident, mistake,

or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to, at law. *Underwood* v. *Stancy*, 1 *Ch. Ca.* 77. 1 *Eq. Abr.* 93. *K. pl.* 2. 6. *Skip* v. *Huey*, 3 *Atk.* 91. *Crosby* v. *Middleton*, *Prec. Ch.* 309. are cases where chancery has said it would fix a surety for mistake or fraud. *Wright* v. *Russel*, 3 *Wils.* 530. *Lord Arlington* v. *Merricke*, 2 *Saund.* 411. *Myers* v. *Edge*, 7 *D. & E.* 254. *Stratton* v. *Rastall*, 2 *D. & E.* 370. *Simpson* v. *Field*, 2 *Ch. Ca.* 22. *Ratcliffe* v. *Graves*, 1 *Vern.* 196. *Nisbet* v. *Smith*, 2 *Bro. Ch. Rep.* 579. *Rees* v. *Berrington*, 2 *Ves.* jun. 540. *Law* v. *E. In.* *Comp. 4 *Ves.* jun. 833. are all cases in favour of sureties. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established, that a surety is never to be implicated, beyond his specific engagement. Calculating upon the exact extent of that engagement, and having no interest or concern in the subject matter for which he is surety, he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency, when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase *his* risk, without his consent; and cannot, therefore, vary the original contract, for that might vary the risk.

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In the present case, the respondent agrees to endorse a note for *Leremboure;* but that note was only to be required upon the happening of a certain event. It was not *any* note that was to be given and endorsed; but it was *a* note to arise on the deficiency of the proceeds of certain sales at *Hamburgh*, and it was to be given to complete a reimbursement, which the appellants were first to seek for, by other

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ways and means, precisely defined. The contract provided, with a studied minuteness, the several modes by which the appellants were to seek a reimbursement. They were first to resort to the policies of insurance, *made to cover the shipments to *Hamburgh*, and which policies were to be assigned to them. But this means could only be resorted to in case of loss on the voyage; and there was no such loss, for the goods arrived safe at the port of destination. "Should this mode of reimbursement not take place," (to use the words of the contract,) the appellants were then authorized to draw, at sixty days' sight, on *London*, and that too, twenty days before their notes respectively became due, and to order the necessary remittances to be made by *Buildemaker & Co.* to meet their drafts. These drafts and orders were, of course, then, all to be made and completed by the 22d of *August*, 1799, which would be twenty days before the last of the notes became due; and, allowing the ordinary passage to *London*, the payment of the last bills there, would have been to be made by the 1st of *December*, 1799. This was the second mode of reimbursement, provided for by the contract. But should the proceeds of the sales at *Hamburgh*, "so disposed of," to again adopt the terms of the contract, not prove sufficient to reimburse the appellants, *Leremboure* was to make good the deficiency, as soon as ascertained, by a note at sixty days, to be endorsed by *Simond*. This was the last and final mode of reimbursement, and upon which the present controversy has arisen. The returns from *London*, of the result of the proceeds of the sales at *Hamburgh*, "so disposed of," would have arrived at *New-York*, in the ordinary course of transmission, by the middle of *January*, 1800, and this was the ultimate time which resulted from the terms of the contract, for the completion of the speculation, and which was to determine the extent of the responsibility of *Simond*. The calculation, as to the time when *Simond* *was to be ultimately called upon, is to be deduced from the contract, with almost as much precision and

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certainty, as if the contract had expressly fixed it at *January*, 1800.

The property in question was intended to answer the bills on *London*, and reimburse the appellants. The remittances, therefore, were to be made from *Hamburgh* by a certain time, because they were to meet a precise object. Both the appellants and *Leremboure* must have contemplated the sales at *Hamburgh* to be made in the summer of 1799, in order to guard against the immense loss in damages that might result, if the remittances were not met in *London*, by the 1st of *December*, 1799, to save the bills from being protested.

The place of sale was clearly designated by the contract. The property was to be consigned to *Buildemaker & Co.* at *Hamburgh*, to be sold. The property was insured for *Hamburgh*. The appellants to order the remittances to be made by *Buildemaker & Co.* to *London*, and these orders were all to be issued by the 22d of *August*, 1799. The remittances were to be made at the risk of *Leremboure*, and the contract further adds, that, should the proceeds of the sales *at Hamburgh* be insufficient, &c. There was no cover provided for risk in transmitting the property to any other place. The ultimate hazard was to terminate there. From all these facts and circumstances, I consider the intent of the contract to be unequivocal and certain, that the property was to be disposed of at *Hamburgh*. A place of sale *intended* by a contract, is equivalent to a place of sale *stipulated* by a contract. What, indeed, are stipulations in *agreements, if they are not acts intended and contemplated by the parties?

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This being the contract, let us next see with what precision it was executed. Instead of winding up the speculation, and ascertaining the deficiency, in *January*, 1800, it was not done till *October*, 1800; and instead of having the tobacco sold at *Hamburgh*, in the summer of 1799, by *Buildemaker & Co.* it was sent over land, a distance of near 250 miles, to *Rotterdam*; most of it not sold till *July*, 1800, and that

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too by a different house, *Roquette Buildemaker & Co.* What reasons are given for this wide departure from the terms of the contract? It is stated and admitted, that, previous to the arrival of the cargoes at *Hamburgh*, and which must have been early in *June*, 1799, many failures had happened among the principal traders there, but the effect that this calamity had upon the market or the price, is not ascertained, and we are left altogether to conjecture. There is no testimony as to the price of tobacco there, during the summer. It is only proven, that from the month of *October* to the end of the year, the price of *Virginia* tobacco was from 3*s.* 3*d.* to 4*s.* *Hamburgh* currency, *per lb.* and so continued in 1800; while, for the same period, the price of *Maryland* tobacco was considerably higher. I am willing to admit, that *Buildemaker & Co.* might have sent the goods to a different market in cases of necessity; such as those resulting from fire, pestilence, or the invasion of an enemy. But this necessity must be clearly made out, and a strong case shown to justify a factor in changing the place of sale, and the agents who are to conduct it. He, by this, exposes the property to unforeseen *accidents, and, perhaps, disconcerts all the arrangements of his principal. No sufficient cause appears, in the present case, for the conduct of the agents. Notwithstanding these mercantile failures, there was no complaint of a want of market or price, as to the sugars; and it ought not to have been left to inference only, but it should have been made affirmatively to appear, that the tobacco could not have been sold during the summer of 1799. If to seek a better market was discreet, was it requisite to go so far as *Rotterdam*, and pass by many large commercial neutral sea-ports and cities, that were much nearer? But this was not all. The property was changed from a neutral to a belligerent port, at the very time too, when *Holland* was perishing under the rapacity of *French* armies, and the scourge of the *Russian* and *British* invasion. This was exposing the property to a new, extraordinary, and, in my opinion, a most unwarrantable hazard.

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In addition to the usual perils of a long transportation, and new agents, it was exposing it to the very extremity of war risks.

Admitting, which I am willing to do, that *Buildemaker & Co.* acted with good faith in this transaction, and that the appellants never gave any directions as to the change of the place of sale; have not the latter done what, in judgment of law, is equivalent thereto? It was a point very much litigated upon the argument, whether *Buildemaker & Co.* were the exclusive agents of the appellants, or only the concurrent agents of them and *Leremboure*. It does not appear to me, to be very material to determine this question, either one way or the other; for, it is sufficient they were not the agents of *Simond*. He had *no agency or beneficial * 63
concern in the shipment, and no agreement, even between the appellants and *Leremboure*, to send the property to *Rotterdam*, could have bound him. The contract, as to him, could not have been varied without his consent. But, I think, it results from the case, that the appellants have made the act of *Buildemaker & Co.* their own. They were to draw bills on *London*, in the summer of 1799, and to order the proceeds of the *Hamburgh* sales to be remitted there. In this mode, and at this time, they were to seek a reimbursement, and it appears, from the account annexed to the bill, that, during *that* summer, they drew on their agents for 30,777 dollars 90 cents. It is to be presumed, that they were apprized very early of the determination of their agents to send the goods to *Rotterdam;* for, after the 13th of *August*, 1799, they discontinued their drafts, and, from that time, they remained perfectly silent and passive, waiting for the returns of the *Rotterdam* sales, until the 18th of *September*, 1800, when they receive and credit *Leremboure* with the amount of them, and then, for the first time, call on him for the deficiency. This conduct amounted to an affirmance of the acts of *Buildemaker & Co.;* for, if an agent steps beyond his authority, the principal may, at his election, and as best suits his convenience, either consider

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him as a wrongdoer, or he may affirm his act, and consider him as a receiver of money for his use. *Willes's Rep.* 407. This latter course the appellants thought proper to pursue, and, therefore, the sound, well known rule of law applies to them, that the subsequent affirmance, by the principal, of the unauthorized act of the agent, is equivalent to an original order. This *conclusion appears to me to result necessarily from the facts. *Buildemaker & Co.* were, generally speaking, the exclusive agents of the appellants, in respect to this mercantile adventure, though, perhaps, under certain circumstances, *Leremboure*, the *cestui que trust*, might have interfered. But it is not requisite, in the view which I take of the subject, to maintain absolutely this exclusive agency. It is sufficient to say, that the transaction was so conducted, that *Buildemaker & Co.* became, in fact, the actual and effectual agents of the appellants, and being so, the appellants not only, in the first instance, directed, but in the last instance, affirmed their conduct, by a strict acquiescence, for one year, in the sending of the goods to *Rotterdam*, and then by expressly receiving, at their hands, the proceeds of the *Rotterdam* sales. If the appellants intended to have pursued strictly the course of their contract, they ought, so soon as they were informed that the tobacco was sent off, and that the proceeds of the *Hamburgh* sales were insufficient, to have then called on *Leremboure* with the ascertained deficiency, demanded their note, and left *him* to have pursued, at his own risk, the property, or the agent who had misused it. They would *then* have been entitled to their note, endorsed by *Simond*, for the deficiency, however great it might have been. It is their sanction of the conduct of *Buildemaker & Co.* that makes it their own. By that means they have so essentially varied the terms of the contract, that the surety is no longer holden.

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The case would not be altered, were it really true (of which, however, we have not the requisite proof) that the sending the tobacco to *Rotterdam* produced *a better price.

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This would be a mere accidental result. It might have been otherwise. But it is the *principle* in the transaction, the variation of the contract, that discharges the surety. This principle is stable and uniform, not depending upon the fluctuations of markets. Nor will it do to say, that *Simond* shall have credit according to the best price at *Hamburgh* in 1799, and be holden only for the deficiency. The principle that releases a surety, under such circumstances, is not to be modified by such a concession. It appears that *Leremboure* was insolvent in *October*, 1800; but how long antecedently he had been so, does not appear. If the contract had been strictly pursued, it is possible that the surety might have indemnified himself, as early as the beginning of the year 1800. The variation of the contract may have thrown him off his guard, and prevented him from holding fast any fund in his possession, or from taking other precautions to indemnify himself, until it became too late to do it with success. As we cannot know or anticipate the possible injuries that may ensue from a departure from the terms of the contract, it is proper that the court should lay down, and adhere to, a general rule on the subject.

For these reasons I am of opinion, that the decree of the court below be affirmed with costs.

Per totam curiam.

Judgment of affirmance.

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Bush v. Livingston and Townsend.

*John Bush, Appellant,

against

Peter W. Livingston, and John Townsend, Respondents.

A security made on a good, and *bona fide* consideration, cannot be impeached on account of a usurious transfer. Therefore, where a mortgage is assigned to a third person, who pays what is due on it to the mortgagee, the mortgagor cannot avoid it in the hands of that third person on account of an agreement to repay him a sum, exceeding the money paid, and legal interest, though the excess will be denied, and only the money actually paid, and lawful interest allowed. If a cause come before this court on appeal from an interlocutory order, and the whole merits of the case appear, the court will make a final decree, and direct the chancellor to carry it into effect.

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FROM the pleadings, and cases delivered in this cause, the facts appeared to be these.

Livingston, in the years of 1796 and 1798, borrowed of one *Evertson*, the two several sums of 3,000 dollars and 2,793 dollars on mortgage. The day of redemption having elapsed, and *Livingston* being further indebted to *Evertson*, for interest and some other matters, amounting, with the above principal sums, to 6,222 dollars, *Evertson* demanded payment. In consequence of this, *Livingston* arranged with him to pay 5,600 dollars cash, and give his notes for the residue. This being acceded to, *Livingston* applied to *Bush* to advance the 5,600 dollars to *Evertson*, agreeing to repay it in 90 days, with a *douceur* of 400 dollars; the money thus advanced, and the *douceur* to be secured by an assignment from *Evertson* of the two mortgages, and their concomitant bonds; each of the several assignments to express 3,000 dollars to be the consideration paid by *Bush* to *Evertson*. These transactions being thus concluded, *Bush* gave to *Livingston* the following receipt: "Received this day, an assignment of one mortgage, bearing date the 4th day of *June*, 1796, given by *P. W. Livingston* to *Nicholas Evertson*, and of another, bearing date the 30th day of *January*, 1798, also given by the said *Livingston* to said *Evertson*, together *with the bonds accompanying the same, which bonds and mortgages I acknowledge myself to hold, of the said *Livingston*, as security for the payment of six thousand dollars, in ninety days from this date, and upon payment of said sum, I hereby agree with said *Livingston* to procure the said bonds and mortgages to be cancelled. In witness, &c. 22d *July*, 1799.

"JOHN BUSH."

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The money not being paid, *Bush*, in *September*, 1800, filed his bill to foreclose, against *Livingston* and several of his judgment creditors, stating, among other things, "that *Peter W. Livingston* applied to the said *John Bush*, and requested him to lend the said *Peter W. Livingston* a sum of money, and offered to secure the repayment thereof by procuring an assignment from the said *Nicholas Evertson* to the said *John Bush*, of the said bonds and mortgages." The bill also set forth, that the assignments of the mortgages were made "for a full and valuable consideration, paid by the said *John Bush* to the said *Peter W. Livingston*, and by him to the said *Nicholas Evertson*, as by the said assignments, endorsed on the said indentures of mortgage, and ready to be produced as the court shall direct, and to which he for greater certainty refers himself, may appear."

Livingston put in his answer, and after admitting the mortgages, demand of payment by *Evertson*, and his own inability, added, that "being urged by his necessities, he applied to the complainant, *John Bush*, *to borrow* a sum of money, to pay off the said bonds and mortgages, or the greater part thereof, whereupon the said *John Bush*, taking advantage of his necessities, offered to *loan* him 5,600 dollars, for ninety *days, if he, this defendant, would agree to repay the same at the expiration of that time, and to allow and pay, for the use and forbearance thereof for that time, four hundred dollars, to which this defendant, under the pressure of his necessities, agreed." The answer then went on, and set forth the contract for the advance, in the manner already stated, averring the *douceur* of 400 dollars to exceed the legal interest, for the ninety days, of the sum lent; that, therefore, the *securities were void in the hands of the appellant*, and praying to have them decreed to be given up to be cancelled.

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In support of the answer, *Livingston* examined *Evertson* as a witness, and he deposed, that the sum paid to him by the appellant, was no more than 5,600 dollars, which he

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considered as a loan from *Bush* to *Livingston;* but that, as to any further consideration for the assignment of the mortgages, he was ignorant, though he acknowledged that he drew up the receipt given by *Bush* to *Livingston* on the execution of the assignment of the mortgages.

After publication had passed, and the cause, as between *Bush* and *Livingston*, was ready for hearing, *Livingston* became a bankrupt, and *Townsend* being duly appointed his assignee, *Bush*, in *February*, 1803, filed a supplemental bill, making him a party.

Townsend, in his answer, admitting himself assignee of the estate and effects of *Livingston*, craved the benefit of the pleadings and proceedings on the part of *Livingston*, and insisted on the several matters therein offered and insisted on by *Livingston*, as a defence and bar to the complainant's claim, which matters, he added, "he was informed and believed were true."

* 69 *The cause, as against *Livingston*, came to a hearing upon the pleadings and proofs; as against *Townsend*, upon bill and answer, when the Chancellor made a decretal order, directing an issue to determine whether the assignment to *Bush* was a usurious contract, or one *bona fide* made. As, however, no specification was made of the evidence to be read on the trial of the issue, and the counsel for the parties could not agree on what should be adduced, application was made for directions as to the proofs to be used, upon which his honour the Chancellor was pleased to order, "that the parties have leave to read in evidence the complainant's bill of complaint, the answer of the defendant *Peter W. Livingston*, the mortgages in the pleadings mentioned, and the assignments thereof, with the exhibits and proofs taken and used at the hearing of this cause in this court, saving to the parties just exceptions to the said defendant's answer, so far as the same is not an answer to the *matters alleged* in the said bill of complaint; and further, that the said parties respectively be allowed to

offer any additional, or other evidence, which may be pertinent to the issue so to be tried."

From this order the complainant appealed, contending, that it ought either to have designated what specific parts of the bill, mortgages, &c. should be read in evidence, or have left it at large to the supreme court, to determine what should be so used; because, from the manner in which the order was expressed, it was referred to the supreme court to determine what should be deemed an *allegation* in the bill. He also insisted, that whatever might be the decision on this point, still, as the court now had the *whole case before them, they would, *of course*, decree definitively on the matter, and that, therefore, he had a right to suggest and insist on whatever might be deemed material, to show that he was entitled to a decree of foreclosure, which this court might pronounce, and remand the cause to chancery, merely to carry such decree into effect.

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The respondents, on the other hand, urged, that the order alone being appealed from, this tribunal had only to decide, whether the Chancellor, on ordering a feigned issue, has power to direct what proofs are to be offered; and, if he has, whether such power was, on the present occasion, legally exercised?

On the cause being brought on, the Chancellor thus assigned his reasons:

Mr. *President*—The bill in this case, after stating the mortgage and assignment, and alleging that the latter was for a full and valuable consideration to the appellant, contained no particular interrogatories, but merely required the respondents to make true, distinct and perfect answers, upon their corporal oaths, to the matters and things in the said bill set forth. The respondent *Livingston* stated the assignment to have been made for a usurious consideration. This appeared to me pertinent to, and a direct answer to one of the objects of the general interrogatory.

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This part of the answer cannot be reconciled to the testimony of Mr. *Evertson*, and it was, therefore, a proper subject for an issue.

That the bill might have been so drawn as to avoid this consequence, as was strongly urged, could not vary the result. The answer contained a precise negation of the allegation on the part of the appellant, *that the assignment was made for a full and valuable consideration; and, I take it, I could not decree against this answer, on the testimony of one witness contradicting it. I, therefore, directed an issue, to try whether the assignment was a usurious, or a *bona fide* contract.

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The certain effect of sending the matter to a jury, without the answer, unless the allegation of the respondent could be effectually supported *aliunde*, would be a verdict disaffirming the answer.

But the intent of the issue is to refer to a jury, whether the greatest degree of credibility is to be attached to the answer, or to the deposition. If either party have any auxiliary evidence, *that* may cause the one or the other to preponderate; but to compare, they must, of course, be contrasted and weighed.

The circumstances of the case, and the rule to be observed, appear, to me, too clear to admit of doubt.

It was said, there was no general rule on the subject; but the rule is well established, that if a case be sent to a jury, on the ground of the evidence being in *equilibrio*, the answer must be sent, as well as the evidence in the cause.

Withdraw the answer, and the scale must, in a moment, kick the beam, for then, there is nothing to form an equipoise.

But it was said, that the allegations of the defendant were in avoidance, and so not evidence. This, I conceive, has been already answered, and, therefore, it is not necessary to repeat my former opinion.

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I, therefore, sent the answer to the jury, as part of the matter on which they were to determine.

Benson, for the appellant. The permission given to read the answer of *Livingston*, in evidence, on the point in issue, that is, whether the contract were usurious or not, was improper; because, *that* part only of an answer can be adduced in testimony, which is an answer to the allegations of the bill. Whatever goes in avoidance, even of that which is admitted, must be proved. *Gilb. L. Ev. 52.* As, therefore, the bill did not allege usury, but the defendant insisted on it, in avoidance of the securities alleged to have been entered into, the circumstances creating the usury, could not legally derive any support from the answer. This doctrine is sanctioned in *Barn. Ch. Rep.* 373.† where it is said that, on an injunction bill, "if a plain equity be set forth by the bill, and admitted by the answer, but endeavoured to be avoided by another fact, the injunction shall always be continued till the hearing." The same principle is to be found in 2 *Eq. Ca. Abr.* 247. It is no argument against this, to urge, that the bill states the assignments to have been made "for a full and valuable consideration." They are words of course, the addition of counsel, and mere surplusage; for it was not necessary to do more than state the execution of the deeds, and pray a foreclosure. Besides, the expression itself is used with a reference to the endorsements on the mortgages, and cannot, therefore, be deemed a substantive allegation. We also contend, that, in the present instance, the Chancellor had no right to order an issue. This is a power to be exercised only in cases of doubt, where the question is on the credibility of witnesses, or on which side circumstances preponderate. Here, there could be no hesitation. The answer of *Livingston* *was inadmissible on the point of usury, and *Everton*, his own witness, who cannot, therefore, be discredited by him, says, he knew not of any. But, admitting that *Livingston's* answer is to be received as testimony; it does

2 *Atk.* 140. 1 *Vern.* 161. 2 *Ch. Ca.* 8. 1 *Bro. Ch. Ca.* 53.

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† *Allen* v. *Crabcroft.*

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not contain any fact amounting, in judgment of law, to usury, so as to affect the securities in the hands of the appellant. The statute against usury applies only to original contracts between borrower and lender, upon which securities are given. The maxim, therefore, is, once usury and always usury; but if not usury in its inception, it can never become so afterwards. It follows, that subsequent discounts or purchases at an under value, however unconscientious, can never taint the original contract. But however this may be, as all the transactions relating both to the original contract and the assignment, are fully before the court, and as it is not pretended that any further light can be thrown on the subject, the tribunal, before which the cause is now brought, will decide on the whole case, without referring it back to an examination, which will serve only to bring it here again. In *Le Guen's* case the same thing was done, and it is no more than the ordinary course of the court.

Riggs and *Hoffman*, contra. To determine whether the answer of *Livingston* ought to have been ordered to be read as evidence, it is only necessary to recur to the practice of the court of chancery, and the circumstances of the case. As to the first: whatever is stated in the bill must be answered, though not interrogated to; for were all the interrogatories, which are usually annexed to a bill, totally
* 74 omitted, still every part must be answered; because *what it sets forth is deemed an allegation. Thus, a defendant is under the necessity of answering, on oath, what is contained in the bill; and the plaintiff has the advantage of purging the conscience of his adversary. But when he has done this, he cannot take a part of the answer which suits his purpose, and reject the residue, under a pretence, that the matter in his bill to which it applies, was surplusage, and needed not to have been answered. Here a consideration was set forth, on which the assignment of the mortgages was made. The defendant *Livingston*, was there-

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fore called on, either to admit the consideration as stated, show some other, or deny it altogether. He has shown it to be usurious, and had the cause, with respect to him, gone to trial on bill and answer, it would have been complete evidence. There was, however, a witness examined, and as the Chancellor might apply for the assistance of a jury, to aid his determination, it was indispensable to order the answer to be read in evidence, for otherwise there would have been nothing to oppose to, or explain the testimony of *Evertson*, and the verdict must necessarily have been according to his depositions. It was requisite that *Livingston's* answer should be read in testimony on another ground. The cause, as between *Bush* and *Townsend*, went to trial on bill and answer; all, therefore, that he says, he believes to be true, and what he refers to himself, must be received as truth. The answer of *Livingston* he expressly mentions, adding, that he had been informed and believed "the matters therein contained were true." Besides, when *Townsend* was, by the supplemental bill, made a party, *Livingston* became a substantial witness. That the Chancellor can direct an issue only where the testimony *clashes, is not correct. In 2 *Vern.* 554.† the answer of the defendant was directed to be read in evidence, merely to enable to draw an inference. The truth is, that, in most cases, it is discretionary in the Chancellor, whether he will send the cause to a jury or not, and that there is no settled practice on the subject, except where an answer denies, what one witness affirms. Then, indeed, an issue is ordered of course, because, on such occasions, the rule is, that chancery cannot make a decree. *Lord Milton* v. *Edgworth and others*, 6 *Bro. Par. Ca.* 580. *Pember et Ux.* v. *Mathers*, 1 *Bro. Ch. Rep.* 52. The principles on which courts of equity proceed, when they order an issue at law, are fully laid down by Lord *Kenyon*, in 7 *D. & E.* 667.‡ "If," says he, "a court of equity direct an issue to be tried, it may modify it in any way it thinks proper. One of the rules of courts of equity is, that they

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† *Ibbotson* v. *Rhodes.*

‡ *Bauerman* v. *Radenius.*

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cannot decree against the oath of the party himself, on the evidence of one witness alone, without other circumstances; but, when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order that a party shall not set up a legal term on the trial, or that the plaintiff himself shall be examined, and when the issue comes from a court of equity with any of these directions, the courts of law comply with the terms on which it is so directed to be tried." As to matter of avoidance being to be proved, that we do not deny. The nature, however, of an avoidance is to be seen. It is something subsequent, and *dehors* that which is admitted or alleged. As if a debt be acknowledged, but it be added, "you released it," or, "I paid it;" there the

* 76 release, or *payment, being matter of avoidance, must be proved. The answer is not by way of avoidance of that which is admitted, but of showing it to be otherwise than stated, and was, therefore, proper testimony. Not only the answer, but the very bill may be ordered to be read in

† *Woollet* v. *Roberts.* evidence. 1 *Morg. Ess.* 111. 1 *Ch. Ca.* 65.† The Chancellor, therefore, had the power to order the issue directed, modifying, as he pleased, the evidence to be used, and, though the reading the answer is confined to the allegations of the bill, that part relating to the consideration of the assignment was proper, because it was alleged to have been *bona fide*. The circumstances of this case render it peculiarly a matter for jury reference. *Bush* is stated to have paid but 5,600 dollars to *Evertson*, and the consideration mentioned, in the assignment itself, is 6,000 dollars. It ought, therefore, to have been left to a verdict of twelve men to ascertain whether the *extra* 400 dollars was not a usurious forbearance for 90 days. That it was so, seems almost confessed. *Bush* sets forth, that *Livingston* applied to him to borrow money; *Livingston* admits it to be a loan, and *Evertson* asserts, that he thought the 5,600 dollars were lent by the appellant. When all parties thus call the transaction a loan, it cannot be pretended it was a pur-

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chase. It is said, however, if the primitive contract was not usurious, no subsequent matter will make it so. True, as between the original parties. But what is the contract here? The mortgages? No. The debt created between *Livingston* and *Bush* to pay off those mortgages, and for which the assignment was to be the security. *Bush* takes the mortgages, not on the original valid consideration, but on *one that was foreign to them, new, and tainted. It is strange that the securities shall stand good for a consideration, which, if they did not exist, would be illegal. It has been ruled, that the security was void, though the debt remained, but never till now argued that the debt was void and the security good. This would be an easy mode of slipping through and evading the statute. Wherever there is a borrowing and lending, it is within the act, and it is not in the wit of man to frame a contrivance to take the transaction out of its operation. *Cowp.* 115.† 776.‡ *Doug.* 740.§ In *Bac. Abr.* 419. *old ed. pl.* 6. there is a case which shows that usury may take place upon a security originally good, and be insisted upon, between the parties themselves.¶ The endorsor of a note for 200 pounds, which had three months to run, passed it to the plaintiff, for the consideration of 197 pounds; at the end of that time, another note at three months, for 200 pounds was given, and three pounds more paid. It was by *Lee*, Ch. J. referred to a jury, to determine whether the transaction was a loan or a purchase; they determined it to be the former, and it was held usury. This authority does away all idea of a purchase, and establishes, that a new security for a debt originally legal, if compounded with a usurious receipt of interest, is bad for the whole, as against the borrower. But though the subject of usury or not, has been entered into, this court can pronounce only on that which is appealed from; the order and its contents.

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† *Floyer* v. *Edwards.*
‡ *Jestons* v. *Brooks.*
§ *Lowe* v. *Waller.*
¶ *Massa* v. *Danling*, 2 *Stra.* 1143.

Harison and *Benson*, in reply. We do not deny the power of a court of equity to send a case to a jury. But

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it is not an *ad libitum* power, and, when exercised, must be for the determination of a fact, not a matter of law. Here the simple question was, whether, on *the circumstances detailed, the transaction were usurious or not. This being an inference of law, ought to have been made by the Chancellor. He could not contemplate the addition of *Livingston's* testimony as a witness, because, to render it admissible, he must have released the surplus of his estate, and the contingency of such an event was, in itself, sufficient to prevent any measure being taken upon the expectation of it. Besides, the issue is, in fact, to try whether the defendant, or his own witness, is to be believed. There is no instance of such an order. Allowing, however, that it was correct to send this cause to a jury, *that* could not be directed to be used as evidence before them, which was not so in chancery. The answer would not, even there, have been testimony to establish the usury; for, as containing new matter, in avoidance, it must have been proved by something extrinsic. For, what avoids, needs not be subsequent. Any circumstance which destroys the otherwise legal consequence of a thing, whether it be contemporaneous, concurrent, or subsequent, is matter of avoidance. Thus, infancy and usury are avoidances, but the former is not a subsequent matter, and the latter takes place in the formation of the contract it avoids, at the very time it is created; yet each, if relied on, must be proved. On this point, the rule in equity is the same as at law. In both, the defence must be strictly made out by evidence. This principle is found in *Tate* v. *Wellins*, 3 *D.* & *E.* 531. Because, as is laid down in 5 *Bac. Abr. old ed.* 420. *pl.* 7. "a court will not easily avoid a bond, and the corrupt agreement ought to be specially and particularly set forth, and the *quantum* of interest, otherwise the plaintiff can never tell what to answer." It *is not possible to vacate the securities in the hands of the appellant, on the score of usury unless it be shown to have existed in the original transaction between *Livingston* and *Evertson*, for it is in

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right of the latter that *Bush* now claims. He can recover from *Livingston* no more than is due in virtue of the primitive contract, which cannot be impeached by an *ex post facto* agreement between *Livingston* and the assignee of *Evertson*. Neither in law nor in equity, is the plea of usury a favourite. By each tribunal the money actually paid is deemed in conscience due, and endeavours are invariably made by both, to give back the principal and legal interest, though they may deny the surplus or excess. In a case in 4 *D.* & *E.*† it was *una voce* laid down, that if an instrument can, by any reasonable construction, be considered not usurious, the court was bound to do so. As, therefore, in this case, the whole merits are before the court, and the securities held by the appellant were given on a *bona fide* consideration, we ask for a final decree.

† *Le Grange* v. *Hamilton*, 4 *D.* & *E.* 613.

Per Curiam, delivered by SPENCER, J. The appellant's counsel have insisted on the argument,

1st. That so much of *Livingston's* answer as charges the appellant with usury, is not evidence, and is to be proved *aliunde*.

2d. That the order of the Chancellor, in leaving at large, what part of the answer was to be read, is therein erroneous.

3d. That if *Livingston's* answer is to be received as evidence, *in toto*, the charge of usury is not, in law, established.

4th. That an issue ought not to have been directed, in consequence of contradictions between *Livingston* and his own witness, *Evertson*.

*5th. That the whole merits of the case being before this court, it will decide thereon definitively, and remit the cause to be carried into execution. * 80.

The counsel for the respondents have combated these propositions, and insisted,

1st. That, independent of *Livingston's* answer, the fact of usury is made out.

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2d. That from the state of proceedings, in relation to *Townsend*, the charge of usury is established.

3d. That from *Livingston's* bankruptcy he can now be rendered a competent witness, and, therefore, an issue ought to be directed.

In investigating this cause, several of the points raised will not be examined, as a decision on them would be superfluous, from the view I have taken of the subject. It appears to me, from the authorities I have consulted, that, admitting *Livingston's* answer in relation to the usury to be evidence, and to stand uncontradicted, I still must maintain, that there existed no usury as applicable to the bonds and mortgages assigned to the appellant; and that, whether the answer is or is not evidence, still, that with respect to the excess of the 5,600 dollars paid by the appellant to *Evertson*, the testimony of the latter, and the admissions in the bill, show that the appellant cannot recover it.

I now proceed to examine whether the transactions stated in *Livingston's* answer, will, under the notion of usury, deprive the appellant of his right to hold the mortgages assigned to him as a security for 5,600 dollars, and the legal interest which has since accrued thereon. In the research I have made, I have met with no authority, or even *dictum*, that a security for the payment of money, in its inception
* 81 uncontaminated *with usury, can, by an *ex post facto* agreement for a receipt of a greater sum than the statute allows for forbearance, be rendered usurious. In the case read by the respondents' counsel, from 5 *Bac. Abr.* 419. *pl.* 6. there was a renewed obligation, in which the usury and the *bona fide* debt were consolidated, and there it was held to be usurious. But this case is not law, as will, I think, be hereafter shown.

The first essential to usury is, that there be a loan. *Hawkins*, in vol. 2. 373. sec. 1. says, "that it is a contract, on the loan of money, to give the lender a certain profit for the use of it upon all events, whether the borrower make any advantage of it or not, or the lender suffer any

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prejudice." It is true, that it may take place in relation to the rent of lands, or the sale of goods, but, as applicable to this case, an inquiry into usury of that kind cannot be necessary.

It is true, that the appellant, *Livingston*, and the witness, *Evertson*, speak of the money paid by the former to the latter, as a loan from *Bush* to *Livingston*. The transaction, however, must decide that point, and not the expressions and language of the parties. *Bush* says, that *Evertson* having demanded payment of his debt, *Livingston* applied to him, and requested him to lend him a sum sufficient for that purpose, and offered to secure the repayment thereof, by procuring an assignment from *Bush* to *Evertson;* and that, accordingly, on the 22d of *July*, 1799, the assignments were made in due form of law. *Livingston* states, that, being urged by his necessities, he applied to *Bush* to borrow a sum of money to pay off the bonds and mortgages, and that *Bush* taking advantage of his necessities, offered to loan him 5,600 dollars for ninety days, if he would allow him for the *forbearance 400 dollars, to which he consented. That it was then agreed between *Bush*, *Evertson* and himself, that *Bush* should pay *Evertson* 5,600 dollars towards satisfying him for the amount due on the bonds and mortgages, and that *Livingston* should secure to *Evertson* what should remain due for principal and interest, *Evertson* assigning to *Bush*, to secure him the repayment of the 5,600 dollars, and also the 400 dollars, in pursuance of which agreement, the bonds and mortgages were assigned. *Evertson* deposes that he understood and believed the 5,600 dollars paid him by *Bush* was a loan from *Bush* to *Livingston*, and his reason for so believing was, that the money was paid at the request of *Livingston* for his sole benefit. The transaction between *Bush* and *Livingston* was substantially this: *Bush*, to gain 400 dollars for ninety days forbearing of 5,600 dollars, advanced the latter sum to *Evertson* for *Living-*

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ston, upon good and valid securities, and took the assignments as for 6,000 dollars.

As between *Evertson* and *Bush*, there can be no question that the latter became invested with all the right of the former to the sum then actually due on the bonds and mortgages. In fact, this payment was not a loan to *Livingston*, because *Bush* paid it to *Evertson*, as the consideration of his assignment. If *Evertson* himself, without the intervention of *Bush*, had exacted 400 dollars, or any other sum, from *Livingston*, for forbearance for a limited period, such exaction, however usurious, would not invalidate the *bona fide* securities. In the case of *Pollard* v. *Scholy*, *Cro. Eliz.* 20. *Pollard* sold to *Scholy* two oxen for 6*l.* 6*s.* 8*d.* payable at *All Saints* next; on the same day *Scholy* required a longer time; *Pollard* gave him to the first of *May*, paying him for forbearance, three quarters
* 83 *of wheat, which amounted to more than the legal interest. In debt for the 6*l.* 6*s.* 8*d.* the defendant pleaded this in avoidance of the contract. The opinion of the justices was, "that the statute does not make the contract void which was duly made, but doth only avoid all contracts for usury, and this last contract is void, being against the statute, but the first was good being made *bona fide*.† In 2 *Hawk.* 377. *sect.* 17. is his case: "*A.* was fairly indebted to *B.* in 1,125*l.* and on *A.* desiring time to pay it, *B.* insisted that 150*l.* should be added to the debt, as he would have nothing to do with interest. Accordingly, *A.* gave him five acceptances for these two sums, payable within fourteen months, and it was held, that the *bona fide* debt subsisted, unimpeached by the subsequent usurious transaction."‡ A reference to the reporter, from whom the antecedent decision is taken, fully justifies the summary of the case in *Hawkins*. The same principle is recognised in 7 *Mod.* 119.§ *Sir T. Ray.* 196.¶ 4 *Burr.* 2253.†† and in *Vin. Abr.* tit. *Usury*, *H. pl.* 6. it is laid down, "that if the first contract is not usurious, it shall never be made so by matter *ex post facto*." The case of *Ferral* v. *Shaen*, 1

† See *Turner* v. *Hulme*, 4 *Esp. Rep.* 11. a note given for the liberation of a defendant under arrest, on a usurious note, tho' for the amount of the very usurious note, cannot be impeached for the usury of the first note, where a third person joins in the second note.
‡ *Gray* v. *Fowler*, 1 *H. Black.* 462. *S. C.*
§ *The Queen* v. *Sewell.*
¶ *Rex* v. *Allen.*
†† *Abrahams* v. *Bunn.*

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Saund. 294. is also to the same effect, that a bond, which was good when made, is not avoided by a subsequent usurious contract, for delaying the day of payment.

All these authorities proceed on the wording of the statutes against usury. They forbid the taking more than the rate of interest prescribed, and declare all assurances, &c. whereby more shall be reserved, or taken, to be void. Now if, in this case, the bonds and mortgages in their creation were valid, if no more interest was reserved than the law allowed, how can *they, conformably to this statute, and the universally concurring expositions of it, become void? If the mortgages and bonds cannot be affected by the charge of usury, much less can the assignment, for the reason, that this is an act between *Evertson* and *Bush*. *Evertson* was capable of parting with his interest in these securities, and *Bush* of taking it. *Evertson* has assigned, for an adequate consideration, all his right to the bonds and mortgages, and this cannot be impeached on the pretence of usury between *Bush* and *Livingston*; because, as *Livingston* is not a party to the assignment, he cannot complain that it is an assurance by which he is bound to pay more than the sum then due on the mortgages.

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I think the appellant not entitled to recover more than the 5,600 dollars, and the interest, on two principles, independently of *Livingston's* answer. 1st. When *Evertson* made the assignment, *Livingston*, as is proved by *Evertson*, gave him two promissory notes for the balance beyond the 5,600 dollars paid him by *Bush*. These notes were accepted by him as a payment of so much, towards the mortgages and his account, and have since been actually paid in full. The assignee of all *choses in action*, excepting bills of exchange and notes, takes them subject to all the equities between the original parties. *Bush*, therefore, though assignee, nominally, for 6,000 dollars, can exact no more than *Evertson* could, and clearly, by transactions between *Evertson* and *Livingston*, before or at the time of

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assignment, no more, as between *them*, than 5,600 dollars could be collected on the bonds and mortgages. But, 2dly. From the appellant's state of his own case, in connection with the testimony of *Evertson*, it appears, evidently, that the *appellant availed himself of the necessities of *Livingston* to obtain more than legal interest; and to use the expressions of Lord *Mansfield*, "though the transaction itself may not amount to usury, yet it was taking a hard and unconscionable advantage." In the case of *Floyer* v. *Edwards*, *Cowp.* 116. it was held that money, thus claimed, should not be recovered in an action for money had and received. In a court of equity, whose peculiar jurisdiction it is to relieve in cases of fraud, and whose maxim it is, *that he who would have equity, must do equity*, I think there can be no doubt, that apart from the consideration of usury, the appellant ought not to recover beyond the 5,600 dollars and the interest. To this I conceive him well entitled. The principles I have advanced, and the conclusions I have drawn, lead to the most equitable and righteous result. The appellant obtains the money really advanced, with interest, and the respondent is relieved from the advantages attempted to be taken of his distresses by the appellant.

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It will be observed, that I have abstained from any inquiry into the correctness of the Chancellor's order in point of form; because, in my opinion, the issue, if correct in form, would have been upon a point wholly immaterial. The respondents could never have made out more than *Livingston* alleges, and on his allegations, taking them for true, my opinion has proceeded, so far as respects the question of usury.

There remains only one point to be considered; that is, whether this court will finally decide the cause? In the case of *Gouverneur & Kemble* v. **Le Guen*, this court, on an appeal from the order of the Chancellor, directing an issue, finally decided the cause, and directed the complainant's bill to be dismissed. It did so on precedents from

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the proceedings of the House of Lords, in *England*, on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, that it will save litigation and expense, I am myself contented to be bound by the precedent which has been made. In my opinion, the order appealed from ought to be reversed, and an order entered, that the Chancellor decree the respondents to pay the appellant, by a time to be limited, 5,600 dollars, with interest, from the 22d of *July*, 1799, with costs, in the court below to be taxed, or that the respondents be foreclosed their equity of redemption.

Judgment of reversal accordingly.

Hallett and Bowne *against* Jenks.

Setting down causes for hearing.

IT was ruled, that a cause cannot be set down for hearing, till cases are delivered.

*Amos Wetmore, Appellant,
against
Hugh White, and Hugh White, junior, Respondents.

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By a sale of mills, the water of the raceway, will pass as an incident. If the water in a stream be owned by two persons, whose lands are on opposite sides, and they agree to erect mills on the land of one, and turn the whole stream to the mills; it is an appropriation of the water to the mills, and if they be held jointly, or in common, a release of the right of one tenant in the mills, will pass his right in the water also. Payment of consideration money, possession and making improvements, take a case out of the statute of frauds, and will entitle to a decree, for a specific performance.

THE appellant being seised of 250 acres of land, on the *east* side of the *Saghquate* creek, in *Whitestown*, to-

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gether with a moiety of the soil under water, and the respondent, *Hugh White*, the father, being seised of 300 acres on the *west* side, with the other moiety of the bed of the creek, entered in the year 1787, into a verbal engagement, to divert on their joint account, for the use and purpose of mills to be erected, the water of the stream to such spot in the grounds of either, as should, in the opinion of one *John Beardsley*, be most proper for the site of a mill. In pursuance of this agreement, *Beardsley* examined the grounds on both sides of the creek, and fixed upon a place on the lands of the appellant. Having thus ascertained where the erection should be made, *Wetmore*, *White*, senior, and *Beardsley*, on the 13th of *May*, 1788, executed a written agreement, to build a grist-mill, on *Wetmore's* land, a few rods north of his house; he and *White* to "*own*" each one-fourth of the mill, in consideration of furnishing all materials, &c. and constructing the dam to turn the water of the creek; *Beardsley* to "*own*" the other two-fourths, on doing the carpenter's work, &c. Upon these terms the mill and dam, being in the course of the year 1788, completed, it was, about the time when they were finished, verbally agreed between the same parties, to build, adjoining to the grist-mill, a saw-mill, to be supplied with water in the same manner, and to be "*owned*" in equal proportions by the three. This also being carried into effect, the mills were used and *enjoyed according to the preceding agreements, for about three years; when being very much out of repair, *Beardsley*, in 1791, in consideration of 600 dollars, by release, duly transferred his interest in them, to the appellant, who, under a parol contract, when they were totally unfit for use, shortly after purchased from *Hugh White*, the father, his proportions, for 187 dollars, and paid the money, but received no conveyance of the shares *White* held in the property, nor was any thing said of the right to the water of the creek

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On concluding the antecedent transactions, the appellant took down the saw-mill, which had become perfectly useless, and rebuilt it entirely. He also, after thoroughly

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repairing the grist-mill, added a pair of new mill-stones, and peaceablyenjoyed both mills for the space of one year, when they were accidentally burnt down.

Immediately after their being thus destroyed, the appellant, at a very great expense, and without any opposition or molestation from the respondents, rebuilt the mills, and continued in the use and occupation of them, and the uninterruped enjoyment of the water of the creek, until *August*, 1797, when the respondent, *Hugh White*, the father, threatened that he would cut down the dam, and deprive the appellant of the use of the water, unless he would become a *Presbyterian*, and join the congregation under the charge of the reverend *Bethuel Dodd*, and would also build a dam and turn one half of the water of the creek over a meadow contiguous to the *Saghquate*, and adjoining to the dam erected for the use of the mills; which meadow, on the 25th of *April*, 1794, the respondent, *Hugh White*, had, in consideration of blood *and natural affection, conveyed, with a moiety of the waters of the creek, to his son, *Hugh White*, junior, the other respondent. * 89

In *September* and *October*, 1797, the dam across the creek was, to the great injury of the mills, at three several times cut through, and the water permitted to escape.

On the 5th *December*, 1797, the appellant filed a bill in chancery, stating the antecedent circumstances, with a prayer for a writ of injunction, to restrain the respondents from molesting or disturbing him in the enjoyment of the mills, mill-dam, and the water of the *Saghquate* creek; that he might be quieted in his possession of them, and for such further, and other relief, as the court might please to direct.

To this bill, the respondents, on the 3d of *August*, 1798, put in their joint and several answers, in which they admitted the situation of the lands of the appellant, and respondent, *Hugh White*, the father; the parol engagement to erect the mill-dam and mills; the written engagement; the sale by *White*, of *his shares in the mills*; the payment of the consideration money; that there was a preliminary

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conversation between him and the appellant, about securing, in some proper manner, the water of the creek for the mills when erected; and a *continued necessity*, for several years after the sale to the appellant, of the mills, *for the accommodation* of the public: that they were burnt down and rebuilt, &c. but the answer denied that the right or privilege in the waters of the creek, had ever been parted with to the appellant, or that he had paid any consideration for it; or, that he had any right to appropriate the waters of the creek to the use of the mills; or to maintain the dam for turning the water from its usual course. The answer *also set forth, that 202 dollars and 40 cents, had, besides some other contingent charges, been paid by *White*, the father, as his proportion of the expenses for building the mills, and that he had sold his interest in them, for only 182 dollars 50 cents, at a time when they were in such repair, and in which they continued for a considerable time afterwards, as to be able to do business as well as at any time since their erection. That soon after their destruction, *White*, the father, as he believed, in a conversation with the appellant, explained to him the nature of the contract for the sale of the mills, and then utterly denied the appellant's right to the water; that the appellant had never requested a conveyance of the right of water, and had, from a consciousness of his having none, erected at his own expense, a temporary dam, below that for the use of the mills, in order to turn the water into the respondents' meadow, the want of which, in consequence of the upper dam, annually injured the crop of hay, and could not be compensated for, by even 1,500 dollars; they also insisted on the statute of frauds.

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The testimony, the essence of which is given in the decision of the court, in general corroborated the facts in the bill, and from that given by two of the witnesses, it appeared, that the understanding of the parties at the time of the first parol agreement was, wherever the mills were built, "*there the waters were to go.*" That *Beardsley* con-

sidered the right to the water, as perpetually annexed to the mills, and never entertained any apprehension of its being liable to be taken away.

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The cause having been heard, his honour the Chancellor, dismissed the appellant's bill with costs, from which decree he now appealed, and his honour thus assigned his reasons:

*Mr. *President*—The appellant deduces his equity from two sources: 1st. A parol contract relating to the saw-mill; and, 2d. A written contract relating to the grist-mill. * 91

It is necessary, in the first place, to determine the extent of the parol contract, as arising from the admissions and proofs of the parties.

From the terms of the bill, it would appear, that the appellant intended to avail himself of both the written and parol contracts, as forming one general connected arrangement of the whole interests, in the subject of controversy.

It states, that *it was* agreed between the appellant *John Beardsley* and *Hugh White*, senior, to complete a *grist and saw-mill*, for their joint use, and at their joint expense, on the land of the appellant. That *John Beardsley* was to have one-half of the grist-mill, and the other parties, each one-fourth; and that each of the parties was to have one-third of the saw-mill, each contributing a proportional share of the expense. That *Beardsley* should allow, to the appellant, a reasonable compensation for his land, and a like compensation to the respondent *Hugh White*, senior, and the appellant, *for the use of the water*.

The respondents admitted, that it was agreed to build the mills, and that the interests were to be in the proportions stated in the bill. But they deny that any contract was entered into respecting the water, or that *Beardsley* had a right in it, or paid for it.

The only witness who has any knowledge of the parol contract between the parties, is *Beardsley;* and, if his testimony is in direct opposition to that *part of the respond- * 92

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ents' answer, which he was required to make, by the terms of the bill, it might neutralize the answer, but can have no effect beyond that, unless aided by other evidence or circumstances. But all the circumstances developed, tend to corroborate the answer.

Beardsley's testimony is very indistinct, from a want of discrimination, as to the object to which it applies. He confounds the grist and saw-mills; the parol and written agreements; and I found it impracticable, from his relation, to distinguish satisfactorily, what part was intended to apply to the written, and what to the parol contract. The same confusion is discernible as to time; and, whether he speaks of contemporaneous transactions, or those which took place at different periods, cannot be discovered.

Mills are generally calculated for duration. But those constructed by the parties were so slight, that the appellant alleges, that, at the time he purchased of *Beardsley*, which, it appears, was in *October*, 1790, and probably, not more than two years after they were finished, (for the contract for this erection was not made till *May*, 1788,) they were already out of repair, and in a ruinous state at the time the respondent *Hugh White*, senior, sold his interest in them, which it appears was early in 1791.

From the permanency of the object of association, on which much reliance was placed by the appellant's counsel, no important result can, therefore, be deduced, in favour of the construction they contend for.

* 93 *Another circumstance, which throws some light on the subject in controversy, is, the different mode of conduct observed between the appellant and *Beardsley*, relating to the common interest, as far as respected that portion which the appellant contributed towards the common undertaking, and that which related to the property of *Hugh White*, the father.

On the 18th of *March*, 1789, the appellant executed to *Beardsley*, an indenture for the undivided half of his land,

intended for the accommodation of the mills, with express covenants for the diversion of the water *in his own land*, for there is nothing in the conveyance, indicating the claim of right to dispose of a privilege of that nature, in the land of the respondent, *Hugh White*, the elder; and on the 9th of *October*, 1790, *Beardsley*, by endorsement on that conveyance, regrants the premises to the appellant. This endorsement is confined to the subject of the former grant merely, and is evidently calculated only to revest the title derived under the conveyance.

There is no evidence of any application for a similar grant to the respondent, *Hugh White*, the father, and though the relationship, which existed between him and the appellant, has been urged as a reason for inducing an unusual confidence between the respondent, *Hugh White*, senior, and the appellant, that consideration would not apply to *Beardsley*, who, in his deposition, alleges, that he supposed the appellant "trusted to the honour and integrity of the defendant, *Hugh White*, senior, and considered the parol agreement as abundantly sufficient." *He* was, however, more interested in the arrangement than *either of the other parties, and he gives no reason for his own conduct.

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Both the appellant, and *Beardsley*, appear to have been fully apprized of the necessity of securing their reciprocal rights by conveyance; and, that it was resorted to in one instance, and unattended to in another, is a circumstance, which, unexplained as it is, has a strong appearance of a mutual reliance, on the advantages each possessed, to apply them to, or withhold them from, the common object of pursuit. The one party owned the land, on which the mills were erected; the other, so much of the water, as contributed essentially to the value of the mills, though not so much of it, as by withdrawing the water, to render the mills totally useless.

Upon the whole, I do not think a parol agreement is made out in proof, admitting the evidence to be compe-

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tent to sustain it, variant from, or enlarging the written contract and the parol contract, admitted by the answer, relating to the saw-mills. It is, therefore, unnecessary to examine the influence of the statute of frauds and perjuries on the case.

2d. As to the written contract.

This has no words evincive of the intent of the parties to perpetuate this joint interest, beyond the duration of the mill, which was the object of it. It recognises the land, on which it was to be built, as the land of the appellant, divides the contracting parties, by describing the appellant and the respondent, *Hugh White*, senior, as of the one part, and *Beardsley* of the other part, and thus, by opposing the interest of the latter, to that of the former, shows, that so far as respected the grist-mill, the most intimate union of interest *existed between the appellant and the respondent, *Hugh White*, the father; and that the confidence which they had in each other could have no influence on *Beardsley*.

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The mills erected in consequence of the written agreement, were destroyed by fire; and *Hugh White*, senior, declares in his answer, that he informed the appellant, before he rebuilt them, that the water was his; and that he had *not* sold it. This is an answer to the matter stated in the bill, to which he was interrogated, and of consequence available to him, to rebut the deductions, which might be otherwise made, from his tacit acquiescence in rebuilding the mills.

The subsequent conduct of both the appellant, and the respondent, *Hugh White*, senior, is an exposition of this intent; for upon the purchase of *White's* share in the mills, by the appellant, instead of procuring a conveyance from *White*, for the rights necessary for his own accommodation, he is content with a mere verbal relinquishment of the share held by *White*, the father, in the mills. This is perfectly consistent with the views of the parties, if the contract was to operate merely to extinguish the rights acqui-

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red by the contract, by the respondent, *White*, senior, in the land of the appellant. But if the appellant's object were to acquire or perpetuate privileges in the land of the respondent, *White*, the father, the grant by him executed to *Beardsley*, and by *Beardsley* to him, shows that he must have been acquainted with the proper mode of securing it.

I am persuaded, from the whole tenor of the transaction, that the parties, at the time of the contract, contemplated only a temporary establishment and *accommodation, to remove the inconvenience to which their remoteness from mills exposed them; that the conveyance from the appellant to *Beardsley*, cannot be admitted to aid the construction of the contract between the parties to it, as it does not appear that the respondent, *Hugh White*, the father, had any agency in, or was privy to it; and, that the better construction is, that the reciprocal interests of the parties were to be affected merely, while the principal objects of their enterprise, the mills, endured; that those destroyed, it ceased to operate.

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I was of opinion, therefore, that the appellant's bill ought to be dismissed with costs.

Platt, for the appellant. The equity of the appellant does not arise, *entirely* from the written and subsequent parol agreement, but also from the original parol contract for the erection of the mills, and appropriation of the water. That there was such an antecedent contract, serving as a *substratum* for the whole, and influencing the future acts of the parties, is proved not only by the testimony, but by the answers of the respondents; and, though *Beardsley* be one of the witnesses whose evidence shows this, yet no objection can be made to his competence, for they have made him their own. Besides, his assignment was a mere quit-claim.

These parol agreements having been in part executed, are uniformly held to be without the operation of the sta-

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tute of frauds. 1 *Fonb.* 176 to 190. 1 *Pow. on Cont.* 295 to 299. 2 *Vern.* 455.† 1 *Bro. Ch. Ca.* 417.‡ 2 *Stra.* 783.§ 2 *Atk.* 407.¶ 7 *Bro. Parl. Ca.* 21.††

*It cannot be argued that the agreements intended to convey only a temporary interest, during the existence of the mills then constructed. The mere circumstance of turning the stream into an artificial and new bed, by digging a canal, negatives such an idea. Suppose the mills had been burnt down the day after their erection, would it have put an end to the contract?

The establishment was in its nature permanent. It partook of the quality of the fee on which erected; the water was an appurtenance inseparable from it; it was like soul and body.

That it was intended to be a permanent establishment, is evinced by the acts of the parties. They are inconsistent with any other intention; and, it is a principle, that where a contract is not definite, but money laid out on it, the court will infer the terms from the acts. 1 *Pow. on Cont.* 297. 2 *Eq. Ca. Abr.* 48. 5 *Vin.* 523. 2 *Vern.* 373.‡‡ The water was indispenable for the mills, and every thing essential to the use of a thing granted, must necessarily pass with it. 1 *Saund.* 322, 323.§§

It is also settled, that where a contract is dubious, the strongest construction shall be against the seller. 1 *Pow. on Cont.* 395. 5 *Rep.* 7. *b.*¶¶ *Plowd.* 140.** 161.*† 171.*‡ 289.*§ *Co. Litt.* 197. a. 267. b. *Roll. Abr.* 228.

These authorities establish, that the respondent sold the waters of the creek. To them may be added 2 *Eq. Ca. Abr.* 685. *pl.* 8. 679. *pl.* 5. *Talbot's Cases*, 252.*¶ 262. 1 *Pow. on Cont.* 302. 2 *Vern.* 363.**† 2 *Ves.* jun. 440.**‡ which show, that as the conveyance to *Hugh White*, junior, was voluntary, it cannot prevail *against a previous *bona fide* purchaser, for a valuable consideration; and, that at all events, as he was a purchaser with notice, the appellant's claim cannot be affected by the grant to the son.

† *Pyke* v. *Williams*
‡ *Whitbread* v. *Brookhurst.*
§ *Earl of Aylesford's* case.
¶ *Only* v. *Walker.*
†† *Newton* v. *Newton & Lee.*
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‡‡ *Halfpenny* v. *Bullet.*

§§ *Pomfret* v. *Ricroft.*

¶¶ *Dowman's* case.
** *Browning* v. *Beston.*
*† *Throckmorton* v. *Tracy.*
*‡ *Hill* v. *Grange.*
*§ *Chapman* v. *Dalton.*
*¶ *Mansell* v. *Mansell.*
**† *Dafforne* v. *Goodman.*
**‡ *Taylor* v. *Stibbert.*
* 98

Had he intended to have relied on the deed, it ought to have been pleaded. *Wyatt*, 324. 335. 2 *Atk.* 240.† 2 *Eq. Ca. Abr.* 681. *pl.* 2. As to the statute, it applies to hereditaments.

† *Brewerton* v. *Gamul.*

Gold and *Henry*, contra. The contract was confined to the first mill erected, and the very written contract relied on is not set forth by the bill, *in hæc verba*, and if that proved be different, the bill ought to be dismissed. 2 *Ves.* 299.‡ 5 *Ves.* jun. 452.§ In this, there is no mention of any agreement whatever, as to diverting the water, building a race-way, &c. The original parol agreement, can never be in issue. It was nothing more than a preliminary conversation, leading to the agreement, and was, when that was concluded, resolved into it.

‡ *Legal* v. *Miller.*

§ *Leg* v. *Haverfield.*

Any agreement as to the water, is expressly denied, and if only one witness contradict the answer, no decree can be founded upon it. As to *Beardsley*, his testimony must be totally discarded. It is inconsistent and incredible; besides, being to uphold his own acts, it is totally inadmissible.

If a plaintiff claims lands by a parol agreement, no witnesses can uphold it, for their testimony is inadmissible. None, *aliunde* the answer can be received. 2 *Bro. Ch. Ca.* 566, 567.¶ Where there is a written contract, no parol evidence is admissible, to alter or vary it, but only to rebut an equity. 2 *Vern.* 34.** *Bunb.* 65.†† 2 *Atk.* 383.‡‡ 1 *Bro. Ch. Ca.* 93.§§ 514.¶¶ 3 *Bro. Ch. Ca.* 168.*† 1 *Ves.* jun. 241. *S. C.* 1 *Ves.* jun. *326.*‡ 402.*§ 3 *Bro. Ch. Ca.* 388. *S. C.* 4 *Bro. Ch. Ca.* 437.*¶ 3 *Ves.* jun. 34.**† 5 *Ves.* jun. 688.**‡

¶ *Whitchurch* v. *Bevis.*

** *Cokes* v. *Mascal.*

†† *Binstead* v. *Coleman.*

‡‡ *Parteriche* v. *Powlet.*

§§ *Irnham* v. *Child.*

¶¶ *Ackroyd* v. *Smithson.*

*† *Hare* v. *Shearwood.*

The doctrine of part performance has rendered the statute of frauds almost a dead letter. Except we be tied down by authorities that govern in this country, we ought to resist it. In *England* it is admitted to have been carried too far, and to support it, the facts ought to be of the most unequivocal nature. 3 *Ves.* jun. 381.**§ 712.**¶ 4 *Ves.*

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*‡ *Brodie* v. *St. Paul.*

*§ *Jordan* v. *Sawkins.*

*¶ *Mason* v. *Gardiner.*

**† *Pym* v. *Blackburn.*

**‡ *Jackson* v. *Cator.* **§ *Wills* v. *Stradling.* **¶ *Forster* v. *Hale.*

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jun. 720. *Amb.* 586.† 1 *Pow. on Cont.* 308, 309. 1 *Fonb.* 174, 175. Remaining in possession, is not such a fact as to be conclusive. The acts must be of such a nature, that the purchaser would otherwise be a loser. Here the appellant is more than compensated by his profits from the mill. We, therefore, contend, that the agreement insisted on, is not clearly shown; that part performance is not proved, and that the contract, such as it was, is, from the testimony, variant from that of the bill. To decide the establishment to be permanent, and the appellant entitled to the water, will be to make a new agreement, for both parties.

† *Gunter* v. *Halsey.*

Van Vechten, in reply. The answer, if viewed attentively, will be seen to admit the original parol agreement. With this, the written contract is perfectly consistent. The bill stated the substance of the agreement, and that was sufficient. The cause was submitted in the court below, on this simple question, whether the establishment were permanent or not. To state more than was necessary to show that, is not, by any rule of law or equity, ever required. *Dormer* v. *Fortescue*, 3 *Atk.* 124. 132. The written agreement disproves a material allegation in the answer, and so
* 100 is admissible. It is also admissible to *illustrate the views of the parties. If the defendant admit the agreement in his answer, he cannot, afterwards, insist on the statute of frauds.

So much water was, from every principle, to be turned off to the mills, as was done in the first instance. This was concurred in afterwards, by both parties; therefore, then, no pretence for avoiding the contract, or excluding testimony on the ground of uncertainty.

The agreement to build, was confessedly executed. *White* does not pretend he ever explained his restrictive idea of the contract, till after the sale to the appellant. What interest did the parties think they had; what had they, in law, in the mills under the first executed agree-

ment? It must have been a fee. This they all imagined, and the respondent *White*, the father, permitted the appellant, under this idea, to go on expending money on the property, without ever undeceiving him. This was a fraud.

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The relief for the appellant must be, 1st. A perpetual injunction; or, 2d. A conveyance, by the *Whites*, of their interests. The acquiescence of the respondents since 1791, is evidence of a permanent establishment.

The matters contended for by the appellant, the water, &c. are incidents to the mill, not realties. The sale of the interest in the mills passed them of course.

Per Curiam, delivered by THOMPSON, J. The only question litigated between the parties, is touching the right to the waters of the *Saghquate* creek, for the use of the mills, now owned and occupied by the appellant. A brief statement of some of the facts *thrown into the case, but not controverted, may afford some assistance in ascertaining the truth with respect to those in dispute. It is admitted, that, in the year 1788, the appellant was seised of the lands on the east side of the *Saghquate* creek, together with an equal moiety of the creek itself. That *Hugh White* was seised of the lands on the west side of the creek, together with the other moiety of the creek, and that being so seised, they, together with one *Beardsley*, built a grist-mill and saw-mill upon the land of the appellant. That a canal was dug for the purpose of diverting some of the waters of the creek to those mills. That the parties continued to occupy them jointly, according to their respective proportions therein, for about three years, when the appellant purchased out the shares of his copartners. The purchase from *Hugh White* was by parol only, and upon this the controversy between the parties arises, presenting the following questions for examination. 1st. Whether the appellant ever acquired any right to the waters of the *Saghquate* creek, for the use of the mills? 2d. If so, whether

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that was a temporary or a permanent right? 3d. Whether, the purchase being by parol, the respondents can avail themselves of the statute of frauds to avoid it?

The evidence appearing in the case, is partly written and partly parol, as to the applicability of which, to the subject matter of complaint in the appellant's bill, some little difficulty and confusion arises. The written testimony, the article of agreement, appears not to have had for its object, the securing of the water to be diverted from the *Saghquate* creek. It was between *White*, *Wetmore* and *Beardsley*, and was *solely for the purpose of providing for the building of the mills, and fixing the proportion of the respective parties therein. The matter of complaint by the appellant's bill, is not for a violation of the articles of agreement, but for an interruption in the use of the waters of the *Saghquate* creek. This written agreement might be admissible, as illustrative of the views and intentions of the parties in erecting the mills, and, in some measure, explanatory of the testimony of some of the witnesses; but the right to divert the water must depend upon some other evidence. The bill of complaint, so far as it may refer to the articles of agreement, is to be considered as a history of circumstances leading to the main subjects of inquiry; the right to the use of the water, and the purchase by *Wetmore* from *White*. The appellant alleges, that he purchased the shares of *White* in the mills, together with the privilege of the water, but reposing confidence in the integrity and uprightness of *White*, he omitted to take a conveyance therefor. This is the subject matter of the complaint, to which most of the testimony on both sides is pointed, and which the appellant alleges was not secured by writing.

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The parol evidence on this subject cannot be viewed as explanatory of the written agreement, or as a preliminary conversation leading to a contract consummated by the instrument in writing; but relating to a distinct and independent subject. An examination, therefore, into the original contract, respecting the water, in connection with the

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sale of the mills, and a decree bottomed thereon, would not, I think, be travelling out of the case, or a violation of the principle, *that the decree must be *secundum allegata et probata.*

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That there was a contract made between *White* and *Wetmore*, relative to diverting the water to the mills, is manifest from the testimony in the cause, the acts of the parties, and the confessions of *White*. The extent of that contract will be hereafter examined. To establish this contract, there is the united and uncontradicted testimony of three witnesses.

Lemuel Leavenworth, who was examined both on the part of the appellant and respondents, says, the parties went in the first place, to view the spot where the mills are at present situated; they then viewed the land on *White's* side, and it was agreed, in conversation, that wherever the mill was erected, "*there the water should go.*" That *John Beardsley* was to determine where the place should be; and that he determined in favour of the place where the mills now are. To the respondents' interrogatories, he answered, that he knew of a verbal contract, for appropriating the waters of the *Saghquate* creek, to the use of the mill or mills, to be erected on the same. *Amos Wetmore* declared, that he heard *Hugh White* say, that wherever the mills should be built, there the waters should go. *John Beardsley* swore, that it was agreed between *Hugh White* and *Wetmore*, that wherever the mills should be built, there the water should go. In conformity to this agreement, we find the parties digging a canal, building a dam across the *Saghquate* creek, and turning the water to the mills.

White, in his answer, I think, impliedly admits, that there had been a contract relative to the water; though he says, the particular plan "*for securing it,*" had not been matured, or carried into effect; evidently, I *conceive, alluding to its not having been reduced to writing.

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If, then, there was an agreement to divert the natural

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course of this creek, the object clearly was for the use of the mills. The same reason that existed at first, for turning the water, would continue to exist as long as the mills remained. By a sale of the mills' generally, I should, therefore, incline to think the water would pass as an incident to them, without any special provision. A contrary inference would be against every reasonable intendment. Supposing the water thus diverted, had been the only water to supply the mills, would there have been a doubt as to the intention of the parties? The quantity of water cannot materially alter the case; and, indeed, it was not denied on the argument, but that the appellant had acquired a right to the use of the water, coextensive with the duration of the mills first built.

But it is not necessary to say, the right to the water passed, as an incident to the mills, in the sense above mentioned; or, that the appellant acquired this right, at the time he purchased the mills. It was, I think, amply secured by a prior contract: and this will account for the language of some of the witnesses, and the guarded expressions in the respondents' answer.

Anna Barnard, a witness on the part of the respondents, testified, that she was present at the time of the sale, and that *White* sold "his right and interest" in the mills, and delivered up his right to the mill and mill-irons, but does not recollect that any thing was said respecting the waters of the creek. The reason of this, probably, was, because
* 105 the parties considered *the use of the waters provided for by the former contract, made before the mills were erected. *Hugh White*, in his answer, admits that he sold his shares in the mills to the appellant, for the consideration of seventy-five pounds, and that the purchase-money has been duly paid. But says, "*at the time* of his relinquishing his shares, no mention was made of any right, interest, or privilege, in the waters of the said creek, nor was any such right or privilege included *in the said contract of sale, of the said mill.*" With truth, *probably*, he might so declare, be

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cause it was not necessary to say any thing on the subject, or include it in the sale, it having been provided for by another agreement. This he does not undertake to deny. He only says, the plan was not matured and carried into effect; by which I understand him to mean, as I before observed, that no writings were entered into; deeming them necessary to mature and perfect the contract.

I the more readily adopt this construction of this part of the answer, because it reconciles it with the evidence. For, if *White* meant to be understood, that no contract whatever had at any time been made, respecting the water, he stands contradicted by three witnesses. I consider the effect of this agreement, as an appropriation of the water to the use of the mills; that it thereby became, in some measure, an appurtenance to them; and that, under such circumstances, a grant of the principal subject would pass the water, as an incident.

The next inquiry is, whether this contract vested a permanent, or only a temporary right to the use of *the water? If I am correct in the construction given to *White's* answer, it is not such a denial of the contract, as to bring it within the rule of equity, making it necessary to establish it, by the testimony of more than one witness. That rule can only be applied to cases where the answer is a clear and positive denial of the fact. 1 *Vez.* 66.† But admitting the answer to be a direct denial of any contract respecting the water; I should not consider it, under the circumstances of the case, as coming within that rule. It is impeached by the testimony of several witnesses, and there are other facts and circumstances, corroborating the testimony of *Beardsley* on this subject. 2 *Atk.* 19.‡ 3 *Atk.* 407.§ 1 *Vez.* 97.¶ If *Beardsley's* testimony is to be received as competent evidence, upon which to ground a decree, under the above rule, it establishes, beyond all possibility of doubt, a permanent right in the appellant to the water, for the use of the mills. *Beardsley* being acquainted with the whole transaction, leading to and attending

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† *Le Neve* v. *Le Neve.*

‡ *Walton* v. *Hobbs.*

§ *Only* v. *Walker.*

¶ *Arnot* v. *Brisco.*

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the building of the mills, gives a very minute account respecting the business, and declares most unequivocally, that the agreement was, that the water diverted from the main channel of the creek, was to be for the supply of the mills for ever. In this he stands, in some measure, corroborated by the testimony of *Leavenworth* and *Wetmore*, who say, that it was agreed, that wherever the mills should be built, there the water should go. The latter declared also, that when *White* sold his right and title in the mills to the appellant, he supposed the use of the water *perpetually* was intended likewise to be sold.

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*It is said, however, that *Beardsley* has so contradicted himself, with respect to the consideration paid by *Wetmore* to *White*, for the water, that he is unworthy of credit. This allegation, I do not think well founded. In his answer to the appellant's interrogatories, on this first point, he says, that *White* was to have one-fourth part of the mill, on account of his allowing the water to be turned from the main creek, for the use of the mill for ever, and for digging, draining, and turning the water; and, in consideration of other things mentioned in a certain written contract. In his answer to the respondents' interrogatory, he says, the consideration that *Wetmore* paid *White* for the use of the water was, that the waters overflowed the lands of *Wetmore*, and that *White* was to have one-fourth part of an acre of land for ever, with the mills erected thereon; one-fourth of the grist-mill, and one-third of the saw-mill, and that he supposed the said contract was completely finished and carried into effect.

The latter examination is more full and circumstantial than the former, but is not, I think, so essentially variant, as to discredit the witness. There is, to me, internal evidence arising from the nature of the establishment, and the acts of the parties, fortifying the conclusion, that it was the intention of the parties, that so much of the water of the *Saghquate* creek, as was necessary for the use of the mills, should be permanently appropriated to that object. A con-

trary conclusion would lead to great doubt and uncertainty. If the appropriation was considered as coextensive with the necessity that at first existed for mills at that place, its termination would depend upon mere matter of opinion. If, with the duration of the mills first erected, doubts might arise to what *extent repairs might be made, for the purpose of continuing the old mills; and to say that they should be suffered to go to decay, without any repairs, would be doing violence to the understanding of the parties. Public accommodation, and private emolument, were probably the primary inducements for building the mills, and diverting the water; the same reasons, for any thing that appears, now exist for their continuance.

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The conduct of *White*, in not disclosing to *Wetmore*, at the time of selling the mills, his claim of restoring the water to its original channel, his sleeping so long upon this claim, and permitting the appellant to expend his money, in repairing and rebuilding the mills, were unconscientious, and form strong grounds for the interposition of a court of equity. 2 *Atk.* 83.†

† *East-India Company* v. *Vincent.*

It is true, the respondent *Hugh White*, swears, that he *verily believes*, he apprized *Wetmore* of his claims, before the mills were taken down or destroyed. This I do not think entitled to much weight. If the fact would warrant it, he ought to have sworn positively, and not merely as to his belief. Besides, it is rendered highly improbable by his acquiescence for five years together. Much was said on the argument, respecting the injury which the diversion of the water would occasion to the respondents' meadows, and much of the testimony in the cause was pointed to that object. This testimony is vague, uncertain, and, in my opinion, irrelevant. If testimony of this kind was proper at all, as furnishing a clew to the intent and understanding of the parties, it should have been confined to the time when the contract was made; and on that subject, we have the estimation of *White* himself; for it appears, from the testimony of *Beardsley*, *that he considered the

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water of so little use to him, and the establishment of the mills so unpromising, in point of profit, that he offered to give the appellant and *Beardsley* the use of the water for ever, together with a barrel of pork, if they would build a grist-mill and saw-mill alone, and he to have no concern with them.

The appellant's claim resting altogether upon parol contracts, it becomes necessary to examine whether any obstacle to relief is interposed by the statutes for the prevention of fraud. I think there is not. It is an established rule in equity, that a parol agreement, in part performed, is not within the provisions of the statute. 1 *Fonb.* 182. and the cases there cited. 3 *Atk.* 4.† To allow a statute, having for its object the prevention of frauds, to be interposed in bar of the performance of a parol agreement, in part performed, would evidently encourage the mischiefs the legislature intended to prevent. Money laid out in improvements, is considered a part execution of a contract. *Pow. on Cont.* 296. So, also, possession, delivered in pursuance of an agreement, is such a degree of performance as to take a contract out of the statute. *Ibid.* 299. Payment of the consideration money has always been held as a part performance. 3 *Atk.* 4.‡

† *Lacon* v. *Mertins.*

‡ *Lacon* v. *Mertins.*

The case before us, I think, falls clearly within these rules. The consideration money has been paid, possession taken, and valuable improvements made. I can therefore see no objection against granting the appellant such relief as will quiet him in the permanent enjoyment of the water, for the use of the mills, to the extent the same was used and enjoyed, at the time he purchased them from the respondent, *Hugh* **White*. This is sufficiently certain and definite, for a decree for a specific performance.

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I am, therefore, of opinion, that the decree of the court of chancery ought to be reversed.

Judgment of reversal unanimously.

Paschal N. Smith *against* Daniel Williams.

An owner of a ship bottomed for more than her value, has not an insurable interest in her. Judicial acts of foreign tribunals are *prima facie* to be deemed correct; therefore no inference to be made against them.

IN error on a bill of exceptions tendered and sealed at the trial of a cause upon a policy of insurance, on the body of the ship *Prosper*, in which *Williams*, the now defendant, was plaintiff below. The case, as stated in the *New-York Term Reports*, vol. 2. from the first to the fourth page inclusive, is accurately detailed, in all respects but one. It is there mentioned, in page 4. that the vessel sold under the attachment for $8,400, instead of 38,500 reals of vellon. In the opinion, however, of *Thompson*, J. page 19. the sums are correctly specified.

The error now relied on was, that the judge at *nisi prius*, in conformity to the decision of the supreme court, ruled the now defendant to have an insurable interest in the vessel, to the extent of the sum he paid for her, though she was then bottomed for a larger amount, and that, unless he, at the time of effecting the policy, knew of the lien upon her, he had a right to a verdict for the value insured, after deducting the price at which the vessel sold.

THOMPSON, J. assigned the reasons of the determination, as they are given in 2 *New-York Term Reports*, 19, 20, 21.

Harison, for the plaintiff. The question now before the court is, whether a man buying a vessel, bottomed for more than her value, has an insurable *interest? Where a ship is hypothecated, an owner can insure only his surplus interest, beyond the amount of the lien. Here he had none. His being a *bona fide* purchaser does not alter the question. He takes the title of his vendor, and stands exactly in his situation. Therefore, as to the effect of the bottomry, *Delavigne* and *Willliams* are to be considered as one person, and the property equally affected by the lien, whether in the hands of one or the other. It is like the

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common case of a purchase of a chattel from an apparent owner. The vendee, unless it be sold in a market overt, takes it subject to the rights of third persons. The defendant, therefore, could acquire no greater interest under the sale, than that which *Delavigne* could dispose of; that is, the surplus value beyond the hypothecation. To the extent of the bottomry bond, the holder of the bond is owner of the vessel; and herein it differs from a mortgage. This will appear by adverting to a bottomry bond, which is, in effect a species of insurance, nay, its twin brother. In the former, the money is advanced before the loss; in the latter, after. In either case, the original owner is, in case of accident, equally secure, as the money is not, like a mortgage, to be returned. By payment of a loss, an insurer becomes a purchaser; so, on a bottomry, which is nothing more than an anticipated insurance, the lender, on making the advance, acquires the property to the amount of the money he pays. Consequently, the original owner cannot have any interest, excepting that which remains beyond the extent of what he borrows. It follows, therefore, that he should not be permitted to insure more than that excess. A *contrary doctrine would

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be to tolerate double insurances, and open a wide door to fraud. A man may take up two-thirds of the worth of his ship on bottomry; if he may also cover, by an insurance, her full value, he would, in case of a loss, put into his pocket, the two-thirds he had borrowed. This would be a temptation to dishonesty. Reason and policy, therefore, require, that only the excess of value, beyond the sum for which a vessel is bottomed, should, in the original owner, be deemed an insurable interest. For the lender of the money advanced, is, to the extent of the loan, the actual owner. In cases of jettison, he is bound to contribute. 2 *Val.* 19. 2 *Emer.* 504. citing *Le Guidon*, c. 19. art. 5. This, it may be said, is the law of *France*, but that the rule in *England* is different. It is not, however, on that account to be preferred by us. The doctrine, from the authorities

cited, is that of the general commercial code, drawn from the oldest books in the world, and resting upon the sanction of various nations in all ages, not upon the maritime ordinances of any particular country. For, if the vessel perishes, the lender on bottomry must be the sufferer; if she be saved, he will be the gainer, and he ought, then, to contribute, which can be only as owner. As a species of double insurance, the policy now before the court is necessarily void. 2 *Val.* 61. 1 *Emer.* 236, 237. For, on a contract which is purely one of indemnity, a clear and certain gain of the sum insured, can never be allowed to take place. It is not correct to argue, that the insurance will be void, or not, according as the fact of the bottomry was, or was not, known to the insured. Ignorance, in many instances, furnishes no pretext for *upholding the policy. If a vessel be not seaworthy, the * 113
insurance will be void, though it was not known that she was so; because, the concealment of a material fact, though innocently done, vacates the agreement, it being the duty of the insured, "from motives of common prudence, to inform himself of every fact and circumstance which may throw the smallest light on the nature and perils of the proposed adventure." *Marsh.* 347. *Millar*, 40, 41. 46, 47. 97. to the same point. It is necessary, now, to proceed to another foundation of the law of insurance, which presents to the recovery an obstacle, which, it is conceived, is insurmountable. Every policy *bona fide* effected, contains an implied engagement, that in case of abandonment, the underwriter shall be entitled to receive the subject matter. It is an essential part of the contract, that the benefit of abandonment shall be saved to the insurer. Otherwise, a loss not absolute in itself, but a mere technical total, on which two-thirds may be recovered, would be totally lost to the underwriter. Tested by this rule, the policy, now litigated, fails in an essential ingredient. The bottomry, though latent and unknown, destroyed that right to the property on abandonment, which

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was the basis of the insurer's undertaking, and therefore avoided the policy. Any thing which takes away from the underwriter those rights, on having of which he is supposed to have entered into the contract, vacates the agreement. A previous direction not to pursue one of three routes, on a voyage, where it was usual to leave the whole three to the discretion of the captain, was held to prevent a recovery, because the underwriter made his calculation, on *the advantage of the captain's judgment as to all. *Middlewood* v. *Blakes*, 7 *D.* & *E.* 162. The same principle ought to govern on the present occasion.

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Riggs and *Benson*, contra. Though the position, that a purchaser of a chattel takes it liable to all the encumbrances which affect it in the hands of the seller, were correct, still it may have further exceptions, than the one arising from a sale in market overt. Liens may become invalid from the *laches* of the persons who hold them. As to markets overt, what are they in this country? Streets, for wood and hay, and other articles. Shops and warehouses, for goods. Wharves, for ships. If property is intrusted to another in such a manner that he *may* dispose of it, a *bona fide* sale is good. It is incumbent on the holder of a bottomry bond to take possession of the vessel on her arrival at her first port. If he do not, it is a waiver of his lien, and the vessel, in the present instance, being *bona fide* sold in a market overt, for such a wharf must be considered, the title of the purchaser is good against all the world. It is contended, however, that he who borrows on bottomry, has not in his vessel any insurable interest, except for her surplus value beyond the sum taken up. There is no such rule in our law, nor in that of *England*, for none such can subsist. Suppose an owner of a ship in a foreign port, bottoms her for a sum, which he lays out in masts, yards, and repairs, to enable her to prosecute the voyage; is not the vessel enhanced in value by so much as is thus actually converted into ship? And cannot the owner insure that,

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into which the money is thus changed? It is true, the lender on hypothecation *has but a special insurable interest, which he is bound to particularize. Therefore, that of the owner remains as before. The doctrine of double insurances does not apply to this case. It supposes the insured to have been the borrower of the money. That is not so here; for the defendant, *Williams*, knew not it was taken up. That the security was not by way of mortgage, if it makes any difference in the question, operates in our favour. For a mortgage passes a legal interest in the subject. Bottomry does not; it only gives a right, if exercised in due time, of going into court and obtaining process against the vessel. The difference is the same as between judgments and mortgages. The first give a lien, but no interest, which is to be acquired only by legal proceedings, instituted upon them. But even in the case of an absolute assignment of a ship, if in the nature of a mortgage, the mortgagor is deemed the legal owner, liable for the necessaries and repairs of the vessel, and, until possession taken by the mortgagee, he alone is entitled to sue for the freight earned. 1 *H. Black.* 117.(*n.*)† Can it, then, be said, that the mortgagor has not an insurable interest? If so, why has not the contract been disaffirmed, and the premium returned? It has been urged, however, that the right to have the benefit of the property abandoned has been lost to the insurer, and therefore the policy is void. Taking it for granted, as has been insisted, that the now defendant acquired by his purchase no title, but what was subject to the lien on the vessel, as he was a *bona fide* purchaser, he had a recourse against the vendor, and on abandonment, that recourse passed with the vessel to the insurer. Besides, the idea of this loss of *the property insured, proceeds on the supposition that the *Consulado* in *Spain* rendered a proper judgment. This we deny, for we contend that the lien by the bottomry was gone, upon the vessel's sailing from the port of her first arrival. The lender should have followed the ship, demanded his money,

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† *Chinnery* v. *Blackburne.*

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and on refusal, have applied to the admiralty for process against the vessel. It is not, however, true, that the property has been lost to the underwriter. He gets the amount of what it sold for, deducted; and, therefore, obtains the full benefit of the abandonment.

Harison, in reply. To make our streets and wharves, markets overt, they should have clerks, and records of the sales made in them. Those are the ingredients required by law. There is nothing, therefore, shown to do away the position, that the defendant's title could be no better than his vendor's. If so, he had no interest, but in the surplus, beyond the amount of the bond. Laying out on the vessel whatever is raised on bottomry, does not increase the interest of the borrower. For it is at the expense of the lender. His money, not that of the insured, has, in case of loss, been expended. To sanction, therefore, the present policy, would be in fact to authorize double insurances. It is a mistake to imagine there ought to have been a return of premium to justify a resistance to the suit, or rescind the contract, as it is called. In cases of non-compliance with warranties, the premium is not always returned, though it may be recovered in the very action where the policy is declared to be void. We trust, therefore, a *venire de novo* will be directed.

* 117 **Per Curiam*, delivered by LANSING, Chancellor. It has been admitted by the parties, and it is so stated in the bill of exceptions in this cause, that the defendant was entitled to have recovered in the court below, if the interest intended to be covered by the policy was insurable.

It has also been admitted in argument, that the intent of the parties, *deducible from the policy*, was to constitute it an interest, and not a wager policy, and the only questions on which the opinion of the court is required, are, 1st. Whether the interest of the obligee, of the bottomry bond, was a valid lien, and such a one as would be enforced by

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the maritime law? 2d. Whether the vessel in question, being subject to a bottomry bond, greater in amount than its value, was insurable by the defendant, *Williams?*

The only objections which have been urged to the validity of the bottomry bond, as affecting the interests in controversy between the parties, are, 1st. That it was not enforced in due time; 2d. That as the defendant, *Williams*, was ignorant of its existence at the time the policy was underwritten, it ought not to vitiate it, as having been made under the impression of mutual error.

As to the objection that the bottomry bond has not been enforced in due time.

The policy appears to have been made on the 13th day of *May*, 1800, on a voyage from *New-York* to *Algiers*, with liberty to touch at *Cadiz*. The ship was purchased in the *November* preceding by the defendant, *Williams*, of *Casimir Delavigne*, for whom a bottomry bond had been executed on it, *by procuration*, at *Amsterdam*, previous to such sale; *but no other circumstance respecting the time * 118
when such bond was executed, the voyage described in it, or the port considered as the home port of the ship, as to the bottomry, were offered in evidence.

It, however, appears, that the bottomry bond was given for 6,500 dollars, which is 1,500 more than the valuation of the ship in the policy, and that she was sold at *Cadiz*, by order of the *Royal Consulado*, who, it is not contended, had not a competent jurisdiction, and who acted judicially on the occasion.

The judgments of foreign courts, having competent jurisdiction, have always been considered *prima facie*, as binding in the points on which they have expressly adjudged. The period of the inception of the contract, on the voyage which was the object of it, not having been disclosed, for aught that appears, it may, though made at *Amsterdam*, as it was done by *procuration*, have been executed the day before the sale to the defendant, and may have attached to the voyage insured, terminating it at *Cadiz*.

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The ship was at *New-York*, at the time of the sale, and there is no proof that she left that port, till she sailed on the voyage insured. Hence there is no ground legally to infer a *laches* in enforcing the lien created by the bottomry bond.

If the voyage to *Cadiz*, was the voyage insured, the intermediate transfer to the defendant, *Williams*, certainly could not avoid the bond, or impair the rights of the obligor. For if a transfer, pending the voyage, constituted an avoidance, the lien supposed to be created by the bottomry bond, must be completely in the power of the obligor to defeat, whenever *it comported with his views. This would lead to consequences too clear to require elucidation.

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As to the 2d objection. The insurer is a perfect stranger to the subject insured; whatever relates to it, must be considered as peculiarly resting in the knowledge of the insured, and the law imposes it on him to acquire a competent information respecting it. This is a salutary and well established rule. For how is it possible to determine with unerring certainty, the exact state of intelligence he possessed? Or what portion of the ignorance he possesses, is to be attributed to his want of exertion, or to his wish of concealment of the latent defects, which may affect his interest? If he does not possess the full knowledge of every circumstance respecting it, involving the interests of others, it may be his misfortune, but it must legally be imputed to him as a fault.

Every reasonable intendment is to be admitted in support of the judgment of the *Royal Consulado*. The defendant, *Williams*, was on the spot, clothed with the powers of owner and master. He was interested, in the one capacity, to vindicate his right of property; in the other, as agent for the concerned, to repel any illegal claims: He had an opportunity to make a defence. In all events, if the judgment was examinable, he might have furnished the reasons

and proofs to warrant it; that this had not been done, affords a strong inference that it was not in his power.

The second question is important as it respects the general interests of commerce, and it is peculiarly desirable that a decision of the court should satisfactorily put it at rest.

*Whenever the bottomry and the policy are coextensive, as to voyage and time, no collision can arise. If the ship arrives at its port of destination in safety, the policy is satisfied; but the lien created by the bottomry still exists. If the ship had been injured by any of the perils insured against, so as to entitle the insured to an average loss, it could not affect the interests of either of the parties to the bottomry bond. But if the ship perishes totally; or if a technical loss is sustained before she arrives at her port, the insured would recover, if the policy is valid, without interest. For the value of the ship being covered by the bottomry, the obligee cannot recover the money advanced on it; his right to it ceasing with the destruction of the ship, or the necessary dereliction of the voyage. To this intent, the obligee in the bottomry bond must, therefore, be considered as owner, for he is to receive nothing unless the voyage is made. * 120

If the bottomry interest existed before the policy was underwritten, and, instead of being limited to the ulterior port of destination described in the policy, was to be enforced at any intermediate port at which the ship might touch; or, if the ship was so much deteriorated as to constitute it a technical total loss, at the port of her destination, no abandonment could be made with effect, and the insurers would be entangled with difficulties, which they had no reason to calculate upon, at the time of making the policy.

The policy of insurance, is always considered as a mere contract of indemnity, and the policy of the maritime law is averse to any devices which may weaken the inducement to exertions, for saving either ship or cargo by the owner, master or mariners, and *operate as an incentive to fraud; * 121

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but in the first case put, it would operate to place the value of the property lost by the obligee in the bottomry bond, in the pocket of the insured.

We find no express authorities on this subject, in our own, or the *British* courts; but if the positions laid down by *Emerigon*† and *Valin*,‡ which have been cited, are to be received as correct, they would fully establish the point, that the value covered by the bottomry is not an insurable interest.

† 2 *Emer.* 386. 396.
‡ 2 *Val.* 61.

To the objections which have been urged against receiving the law from *Valin* and *Emerigon*, on their authority, it may be observed, that their positions on this subject, appear untinctured by local considerations; and if the mind assents to their correctness, there can be no reason for resisting truth, from whatever source it may be derived.

The treatise of *Valin*, is professedly a commentary on the ordinances of *Louis* XIV. But in illustrating the doctrines they sanction and enforce, it refers to the antecedent usages which had obtained in the several nations of *Europe;* the ordinances of the free *Imperial*, *French*, *Italian*, and *Hanseatic* towns; the city of *Wisbuy* on the *Baltic;* imperial and royal ordinances; and, among the rest, some of their principles are said to have been deduced from the ordinances of *Eleanor*,§ wife of *Henry* II. king of *England*, then Duchess of *Guyenne*, one of the fiefs held of the crown of *France*, and of consequence, in the spirit of those times, the duchess was considered as one of its vassals. These ordinances were afterwards confirmed and enlarged, according to the *French* writers, by her son, *Richard* I. king of *England*, who was also Duke of *Guyenne*, and, of course, stood in the *same relation to the crown of *France* with his mother. But the *English* respect them as the production of that king. This is merely intimated by way of illustrating the origin of the usages which influence the modern commercial regulations, and the little regard which has been paid to the authority which promulgated them; for, in this instance, on the foot of authority,

§ *Conference de l'ordonnance, Louis* XIV. 7.

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they would probably have been indignantly rejected by the *French*, as the act of one of the feudatories of the monarchy.

The laws of *Oleron* could receive no sanction in *France;* and, perhaps, not in *England*, from the authority of King *Richard;* and it has even been doubted, from the language in which they are published, and from the places mentioned in them, whether their object extended beyond the duchy of *Guyenne*. There were unfavourable circumstances arising from the relative situation of the prince who enacted, and the princes whose subjects received them, to repel their introduction, even on the ordinary ground of public utility and convenience; and yet it appears, from the *French* writers, that they are considered as forming part of their maritime code.

The laws of *Oleron* have been mentioned as a compilation, and probably were so. They must have obtained the authority attached to them, in consequence of their intrinsic worth, and the estimation in which they were held, to regulate the intercourse between the merchants of different nations.

If such their origin, and such the steps in which we trace the progression of these celebrated codes, from ancient to modern times, why should the inquiry whence they originated, be permitted to banish from our country, the well established, salutary usages *of trade, sanctioned by * 128
the long experience of the *European* nations?

The *English* courts consult the *French* authors, on general maritime law. *Park* observes, that the ordinances of *Louis* XIV. "are an excellent body of sea-laws, to the merit of which all *Europe* has borne testimony;"† and he † *Park's Intro.* 39.
remarks, that they had the good fortune to meet with a laborious commentator in *Valin*, who, he says, "being thoroughly sensible of the advantages which his country must necessarily derive from such an excellent code, has, with a degree of labour and industry which excite our admiration, and which are highly deserving of imitation, placed it

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in the most favourable point of view; has cleared up every obscurity, by tracing their laws to their ancient sources," &c.

Of *Emerigon*† he also speaks in terms of high approbation, and of the "*infinite labour, unwearied study and reflection*," with which he had made his collection.

† *Park's Intro.* 10.

All our laws relative to insurances and bottomry, are derived to us, from similar sources, and I rather think, though I speak only from general recollection, not having examined the point, that few other than restraining statutes exist in *Britain* respecting them.

This case has been likened to the case of a judgment and mortgage; but in both cases, though the existence of the lien must necessarily terminate by the operation of a title paramount, or with the destruction of the subject on which it attaches, the debt survives. The right of the holders of those securities, may be more circumscribed by events of that description, as to object, but retain all their energy as
* 124 to the person *and remaining property of the judgment debtor, or mortgagor, and the safety of the property bound by the judgment or mortgage, does not form the essence of the debt. Not so with a bottomry interest, which perishes with the ship to which it attaches.

It will be perceived, that I have not confined myself precisely to the line in which this case has been discussed, or pursued it in the extent to which it was protracted; that I limit my opinion simply to the points, that there is no ground to question the judgment of the *Royal Consulado*, and that the *owner of a ship, covered by a bottomry bond, to an amount beyond her value*, has not an insurable interest.

I am therefore of opinion, that the judgment of the supreme court be reversed.

Judgment of reversal.

Abraham Bloodgood, Appellant, *against* Martinus Zeily, Respondent.

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THE respondent, by his bill, in the court below, set forth, that in 1783, he purchased from the appellant a farm, then lying in the county of *Albany*, called the *Clabergh*, for which he was to give 450*l.* That of this sum he paid, on the purchase, 100*l.* in *money, 25 skepples of wheat, and 8 *cwt.* of flour, executing, for the residue, a bond and mortgage, dated the 24th of *February*, 1784, being the day after the date of the conveyance to himself. That the appellant having obtained judgment on the bond, sued out, on the 1st of *September*, 1789, a *fi. fa.* directing a levy to be made, for 510*l.* debt and costs, which was accordingly done. That a sale did not actually then take place, because the respondent, on the 19th of the same month, *in order to obtain a longer time for payment*, assigned to the appellant, *as an additional security*, for the money due to him, class-rights for 1,400 acres of land, located at the south end of *Cayuga* lake, with a power, authorizing him to take out letters patent, in his own name; and the appellant, at the same time, executed to the respondent, by way of defeasance, a bond for 300*l.* conditioned, that if the respondent, his heirs, &c. should pay the appellant, his heirs, &c. 250*l.* within one year from the date thereof, then the assignment of the class-rights should be void. The bill then stated, that the appellant, in *October*, 1790, under an execution issued upon his former judgment, sold the *Clabergh* farm, and having himself purchased it in, directed the sheriff not to sell the personal estate of the respondent, as he, the appellant, was fully satisfied. That immediately after, the appellant declared to the respondent, he knew

If after a mortgage be forfeited, and execution sued out, on a judgment recovered on the bond, a conveyance to secure a portion of the mortgage money, be made of other property, redeemable on paying a certain sum at a future day, such conveyance will partake of the quality of the original transaction, and be deemed a mortgage, and not a defeasible purchase; therefore, if after lapse of the day, for repayment, the lands conveyed be sold to a *bona fide* purchaser, though the purchase will not be impeached, the grantor will be entitled to an account, and the sum at which the land was sold, with interest, will be the amount for which he will be entitled to credit, though he did not demand a redemption, for more than six years after the day of repayment. After a judgment, an execution, and sale under a mortgage bond,

the court will not open the account on the mortgage, though there be some degree of irregularity in the accounts, if from the whole they appear to be fairly closed. *Query*, if an agreement by a mortgagee, who has bought in the mortgaged premises, to divide with the mortgagor, the surplus produce of a resale, after deducting debt and costs, if he will show the best lands, so as to get for the estate a given sum, be a valid agreement; or whether the showing the lands, be a condition precedent; *Query*.

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of two persons, who were desirous of purchasing the farm, which he meant to sell, for 500*l.* and therefore, requested the respondent to show them the best lands, it being his intention to divide with the respondent, the surplus which might arise after payment of debt, interest and costs; therefore, to avoid the expense and trouble of a deed from

* 126 *the sheriff, the respondent, at the instance of the appellant, conveyed the farm to him, in consequence of which, he entered into possession, and sold the property for 500*l.* to one *Henry Effener*, to whom the respondent had, by the appellant's request, shown the estate. That letters patent had been obtained by the appellant, in his own name, for the class-right lands, which were worth 4,000*l.* The bill then set forth the usual application for a settlement, offering to allow all reasonable costs, &c. if the appellant would account for the proceeds of the sale to *Effener*, and reconvey the 1,400 acres, which it concluded, by praying to be decreed.

The appellant, by his answer, admitted the purchase of the *Clabergh* farm, its subsequent sale under the execution, and his buying it in, as alleged; but the sum directed to be levied, or the amount precisely due, he could not, he said, recollect. He acknowledged also, the assignment of the class-rights, his taking out the letters patent in his own name, the executing to the respondent the bond for 300*l.* conditioned as set forth, and selling the farm to *Effener*; but he insisted the assignment of the class-rights to have been in consideration of 100*l.* therein expressed, and denied that it was made as a security for payment of the debt due on the bond and mortgage; or that he had any communication with the respondent, after the sheriff's sale, or requested a conveyance; on the contrary, he averred, that he received a deed from the sheriff, dated the 12th *September*, 1791; though he acknowledged to have sold in 1796, the 1,400 acres of class-rights, to *Simeon De Witt*, esquire, for 500*l.* which was the highest price that could then be obtained.

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*On the nature of the assignment of the class-rights, whether it was a defeasible purchase, or merely an additional security, as both parties relied on the facts in the bill and answer, neither examined any witnesses. To show, however, an adequacy of price, in the consideration stated in the answer, the president of the senate was interrogated, and he deposed, that in *September*, 1789, the value of class-rights was from five to 10*l.* *per* 100 acres. That in 1790 and 1791, he located 13,000 acres, for about two shillings *per* acre. That in 1792, he purchased, for 100 dollars, a lot of 600 acres, more valuable than the class-rights in question, and on which they adjoined.

To establish the sum due on the *Clabergh* farm, at the time of its sale, the agreement to divide the surplus, after satisfying the appellant, the subsequent purchase by *Effener*, and the liability of the appellant to account for the value, two witnesses were, together with *Effener* himself, examined.

The two first deposed, they were present when the property was sold by the sheriff; that the appellant acknowledged his original demand was only 500*l.* from which were to be deducted some payments received; one to the amount of 100*l.* which had not been credited. That the appellant further said, if the respondent would show the best lands, so that 500*l.* might be obtained on the resale, he should have the whole amount of what might remain, after discharging debt and costs.

Effener testified that the respondent, in consequence of a written request from the appellant, showed him the *Clabergh* farm, of which he became the purchaser, for 500*l.*

Upon these facts, his honour the Chancellor decreed, "that the accounts between the parties, relating *to the mortgage, remained closed, the mortgage being satisfied: but inasmuch as it had not satisfactorily appeared to the court, whether the 100*l.* proved to have been paid by the complainant, to the defendant, was the consideration expressed in the assignment of the class-rights, for 1,400 * 128

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acres, or another sum of money; and inasmuch as that assignment was considered by the court, as an additional security for the money payable on the mortgage, and made for no other purpose or intent, and inasmuch as the defendant has admitted, that he procured letters patent for the 1,400 acres, which he has since disposed of; and as the court was not fully advised, to what measure of compensation the appellant was entitled for the 1,400 acres; his honour directed, that it be referred to a master, to ascertain when and in what manner the 100*l.* was paid to the complainant; what was, on the 1st of *December*, 1792, the value of the said 1,400 acres, and what their value on the same day, in the year 1796, and that a master examine *Effener*, whether, at the time he delivered the written request mentioned in his deposition, to the complainant, or at any time afterwards, the complainant showed to him the mortgaged premises, or any, and what part thereof; and that the said master report the proofs taken in the premises, and his opinion thereon, and that all further directions be reserved, until such report shall be made." From this decree, the case now came up, on appeal, and the Chancellor thus assigned his reasons:

Mr. *President*—On this case, three questions arise. 1st. Whether the respondent is entitled to an account? 2d. Whether, to the surplus of the production of the sale by the appellant, after satisfying *debt and costs? 3dly. Whether to a conveyance for the 1,400 acres located, and granted to the appellant, or a compensation for them?

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As to the first question, the parties have not made out what was the consideration money agreed to be paid on the purchase of the farm in question. The respondent alleges it was 450*l.* The appellant, in his answer, declares he does not recollect it, and the deed imports it to be 410*l.* The respondent alleges, that 100*l.* some wheat and flour, were paid on account, and the mortgage taken for the residue.

The mortgage is also for 410*l.* It is, therefore, evident, from the written transactions of the parties, that the sum due on the 24th day of *February*, 1784, the date of the mortgage, was 410*l.*; and though the respondent's allegations are not otherwise to be regarded, if not admitted or verified, than as limiting his claim, if they are admitted to that intent, it appears from his own showing, that the money, wheat and flour, alleged in his bill to be paid in satisfaction of the consideration money, were paid prior to the execution of the mortgage, and, therefore, cannot be received as a credit on the debt secured by it.

There is no other allegation in the bill, of a payment made on the part of the respondent, though one of the witnesses swears, that at the time of the sale, the respondent alleged, and the appellant admitted, that a credit had been omitted of 100*l.*; and the subsequent declaration of the appellant, that he was satisfied with the product of the sale of the farm, and his direction to stay the sale of the personal property of the respondent, appear to have been prompted by the admission of such payment.

* 130 *This is strongly corroborated, by the result of the calculation of the amount of the principal and interest, payable on the mortgage, and the amount of the moneys admitted to have been paid in satisfaction, from which it appears, that at the time of the sale, a sum, somewhat exceeding 100*l.* beyond the production of the sale, was necessary to satisfy the appellant.

Both parties seem to have conceded, that the debt was satisfied, and the respondent has not pretended that it was overpaid; though, from the irregular mode in which the business was conducted, the precise manner in which it was effected, cannot be satisfactorily developed, nor does it appear to me necessary to attempt it; for there is ground, in my opinion, to consider the account respecting the mortgage as closed, excepting only as to one item, which requires some further examination.

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The 100*l.* which the respondent alleged he had paid, and the appellant admitted to have been paid, rests merely on those declarations, made at the time of the sale of the farm. No receipt has been produced; no circumstance disclosed, from which the time and manner of the payment can be collected. Connecting these considerations with the manner of adjusting the class-rights, some doubts are excited in my mind, whether the 100*l.* so paid, is not the sum described as the consideration money in the assignment of the class-rights.

To elucidate this point only, and not to open the account on the mortgage, I think it a proper object of reference to a master.

As to the second point. Whether the respondent is entitled to the difference between the purchase and sale price of the farm?

* 131 *Here the respondent has limited his demand, by his bill, to one half; the evidence would entitle him to the whole, if to any thing.

That the appellant promised that he would divide such difference with the respondent, is not positively denied by the appellant in his answer; and it has been proved by two witnesses who were present, and swear to the conversation. But they declare that the promises were made on the condition that the respondent should show "*the best of the land*," to persons disposed to become purchasers, so as to enable him to sell it at 500*l.* It is proved that the appellant sold the land for 500*l.* But though there is proof that the appellant required the respondent to show the farm, by a letter delivered to him, by *Henry Effener*, the person who afterwards purchased it, there is no evidence of a compliance with that request.

The result expected to be produced by the respondent's showing the farm, was actually produced *by the selling it for* 500*l.*; but it is not ascertained whether he did, or did not, perform the act, which entitled him to the benefit of the appellant's promise. If he did not, I can dis-

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cover no ground, on which I can decree its performance, for the showing the land, was in the nature of a condition precedent. The delivery of the letter containing this request, and the subsequent purchase of the farm, by the bearer of it, for the sum fixed by the agreement, I think, however, raises that kind of presumption that the service was actually performed, which will warrant a further inquiry out of the ordinary course; I therefore, also, referred *it to the master, to inquire whether the respondent showed the farm to *Henry Effener*, in consequence of the letter, or at any other time before, or after it was written.

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I further stated, Mr. *President*, that I should have no objection, on the coming in of the report on this subject, to hear the parties, on the regularity of this last point of reference, if either of them, from its nature or object, supposed it not in strict unison with the course of proceeding in the court below.

As to the third point. I have little doubt that the assignment of the class-rights was made under the pressure of an execution, without an advance of money on account of the purchase; for the appellant does not pretend it in his answer, and the nature of the transaction forcibly repels any presumption arising from its acknowledgment in the assignment. But whatever the intent, all the circumstances attending it indicate, that, equitably construed, it can only be considered as an additional security. The bond speaks a plain language. It contains a clause in the condition, that if 250*l.* were paid in one year, that then, not only that bond, but the assignment should be void. It was coupled with a forbearance for one year, and for this forbearance 150*l.* was exacted, beyond the legal interest, if the respondent should have it in his power to redeem, at the expiration of that period. I am, therefore, very clear, that the doctrine of conditional purchase-right is wholly inapplicable, and that the appellant ought to respond for the 1,400 acres of land located.

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If this land had not been alienated, the appellant having become a trustee for the respondent, so soon *as the grant to him was perfected, a conveyance of it to the respondent would, I think, under the circumstances of this case, be a thing of course. But the appellant alleges that he has sold it; and, as it is not pretended that Mr. *De Witt*, the grantee, had notice of the trust, the conveyance to him must be considered as valid, and hence it may become a question of some difficulty, what ought to be the measure of compensation.

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As then advised, I incline to think, that the period at which the land ought to be valued, was the time of the demand, which is stated to have been in 1796, though the sale was made in 1792.

Without, however, giving an opinion on this subject, I ordered it to be referred to a master, to ascertain what was the value of the 1,400 acres of land, at both those periods, but if any improvements had been made thereon, exclusive of such improvements and the sum expended by the appellant, in obtaining the letters patent therefor.

The question respecting the validity of a sale of an equity of redemption, which was urged in the course of the argument, is settled, I conceive, by the respondent's own showing, that he confirmed the sale by a subsequent conveyance.

Lush, for the appellant. This case presents two questions. 1st. Was the respondent entitled to one half of the surplus, if any, on the sale to *Effener*, of the *Clabergh* farm? 2d. Was the conveyance of the class-rights, a defeasible purchase, or a mortgage? On the first point, it is evident, there was no surplus in fact. A short statement will show this.

*February 24th, 1784, there was due - -	410*l.*
Interest to the 19th *September*, 1789, - - -	159*l.* 18
Due the appellant on that day	569*l.* 18
Deduct then paid	100*l.*
Balance remaining	469*l.* 18
Add interest from thence to the day of sale	31*l.*
Poundage and costs - - -	17*l.*
Due on the *Clabergh* farm when sold	517*l.* 18

It is, therefore, clear, then, that the above sum, and not 374*l.* only, was justly owing to the appellant when the property was brought to sale. The price, therefore, paid by *Effener*, could not yield a surplus. But allowing that there was one, still the appellant would not be bound to pay it over. His declarations, that are now relied on, and endeavoured to be turned against him, were made in the unsuspecting goodness of his heart, and without any consideration. They amounted to nothing, and can be considered but as a *nude pact*. It may be said, that a very trifling thing will be sufficient to raise a consideration, and for this the authority of 1 *Pow. on Cont.* 342, 343. may be cited. But he does not seem to have apprehended the cases to which he refers. They merely establish, that where a consideration has passed, a very little will amount to an acknowledgment. Thus, in the decision from *Croke*,† A. demised to B. and B. assigned to C. who promised A. to pay the rent due, if he would produce to him the deed by which it was reserved. A. showed him the deed, and held that he was bound. So in that from *Dyer*,‡ the defendant had received 50*l.* from the debtor of the plaintiff, and when called on for it, *said he was not at leisure, but would pay it at another day. To make a contract valid, both parties must be bound. Here the respondent was not, for he never assented. Upon this principle, therefore, the contract was null, and though a surplus had arisen, it could not have been recovered.

† *Sir Anthony Sturlyn* v. *Albany*, *Cro. Eliz.* 97.

‡ 272. *b. n.* (32). *Gilbert* v. *Ruddeurd.*

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The mere inspection of the assignment is sufficient to

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determine the second question, and evince it not to be a mortgage. It has not one single feature belonging to such instruments. There is no loan of money in it; no stipulation for repayment; no covenant; no remedy upon it. These are necessary ingredients to create a mortgage. The first is peculiarly essential. A defeasance cannot be presumed; for the *English* practice on this point is unknown to us. Nothing can be argued from its not appearing that the assignment was ever recorded; for, when it was executed, class-rights were *choses in action*. There is one circumstance, which seems conclusive in ascertaining the nature of the deed. The appellant was empowered to take out the letters patent in his own name, and thus enter on the land. Had the instrument been intended to operate as a mortgage, this would not have been done; for, under that species of security, the mortgagor always remains in possession. This departure from general usage shows a mortgage was never intended. The determinations in *Jason* v. *Eyres*, 2 *Ch. Cas.* 33. *Howard* v. *Harris*, 1 *Vern.* 33. *Willett* v. *Winnell*, *ibid.* 488. and *Jennings* v. *Ward*, 2 *Vern.* 520. which may be adduced, as strong cases of redeemability, against the tenor of deeds, do not apply. They only settle the rule of once a mortgage, and ever a mortgage. But *Cotterell* v. *Purchase*, *Cas. temp. Talbot*, 61. goes the *whole length of the case before the court. It was there held, that an absolute conveyance, accompanied with possession, will not easily be presumed a mortgage, though there be an incongruous covenant in it. In *Ensworth* v. *Griffith*, 1 *Bro. Parl. Ca.* 149. a purchase of an equity of redemption by a mortgagee, though accompanied with a written memorandum of an agreement to permit a redemption, was, after a lapse of the day, ruled to have become absolute, and principally on account of the full worth of the estate having been paid. This circumstance is exactly analogous to the ground of the appellant's claim. *Barrell* v. *Sabine*, 1 *Vern.* 268. shows the distinction between a conditional purchase, and a mortgage. The first

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requires a strict adherence to the day limited for the repurchase, because lending and borrowing is not the basis of the contract, and, therefore, though the value of the property was greatly enhanced, and there was a clause to restore, on repayment, on the day appointed, the court refused to direct a reconveyance, as the sale was absolute. The same principle is found in *Floyer* v. *Lavington*, 1 *P. Wms.* 268. But the case most like the present, is *Tasburgh* v. *Echlin*, 4 *Bro. Parl. Ca.* 142. There, the sum of 200*l.* lent on a proviso, similar to that in the assignment of the class-rights, was, merely because there was no covenant for repayment, held to be a conditional purchase, and a redemption denied, though the value of the estate was 900*l. per annum*, and the lender had himself filed a bill, praying a redemption or foreclosure. With this train of adjudications, therefore, in support of the appellant's title, there can, it is presumed, be little doubt of a reversal.

**Van Vechten*, contra. The agreement to divide the surplus, that might be produced from the sale of the *Clabergh* farm, is proved by the testimony of two witnesses. It remains, therefore, only to show that there was a consideration for such agreement, and that a surplus did arise. To create a sufficient consideration, the mere showing the lands would suffice, and *Effener* himself proves that it was performed. In support of there being an actual surplus, we have only to advert to the declarations of the appellant himself. When the land was struck off to him in *October*, 1790, for 340*l.* he acknowledged himself to be satisfied, and he afterwards sells for 500*l.* This, then, must have left a surplus, of the half of which he instantly became, under the agreement, trustee for the respondent, and of course, liable to account. As to the assignment of the class-rights, the circumstance of its being given under the pressure of an execution, merely to have a further indulgence, shows it to have been no more than a further security for the original debt; and redeemability, of course, a

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necessary incident. The defeasance with which it was accompanied, still further elucidates this idea, and corroborates our position. It is a settled principle in equity, that every contract for the securing of money is a mortgage. 1 *Pow. on Mort.* 146. Therefore, though the condition of a mortgage be to redeem during the life of the mortgagor, the heir will be entitled to redemption. *Kilvington* v. *Gardner*, 1 *Vern.* 192. Absolute conveyances, accompanied by defeasances, in separate deeds, are, by our statute,† considered as mortgages, and directed to be registered as such. *1 *Rev. Laws*, 481. s. 3. The case of *Manlove* v. *Ball* and *Bruton*, 2 *Vern.* 84. goes the whole length of the one before the court. There, in consideration of 550*l.* an absolute conveyance was made of a church lease for three lives. The grantee executed a separate instrument, by which he agreed, on payment of 600*l.* within a twelve-month, to reconvey. The 600*l.* were not paid. Yet a redemption was allowed after the expiration of near 20 years, and though the defendant had twice renewed the lease, on the dropping of two of the original lives. The mere lapse of the day of payment never works an injury, where there was an original redeemable interest. *Exton* v. *Greaves*, 1 *Vern.* 138. *Croft* v. *Powel*, *Com.* 603. Even a fine and non-claim for five years, creates no difference. *Rowell* v. *Walley*, 1 *Ch. Rep.* 218. *Welden* v. *Duke of York*, 1 *Vern.* 132. In *Stanhope* v. *Thatcher*, *Prec. Ch.* 435. an estate-tail created for the security of a sum of money, and even the fee subsequently acquired by a recovery, were held, in equity, to amount only to a mortgage, and defeasible on payment of the money due. In viewing this case, it is to be remembered, that redemptions are favoured, and defeasible purchases discountenanced. *Howard* v. *Harris*, 1 *Vern.* 191. The appellant might have treated the assignment as a mortgage. It must, then, be equally so with respect to the respondent; for it cannot be a mortgage on one side only.

† *Act concerning mortgages.*

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Henry, in reply, insisted, that however good such an agreement as that to divide the surplus of the *Clabergh* farm might have been, if assented to, it could not prevail between the respondent and appellant; *because the former, by refusing to reconvey, and driving the latter to the necessity of receiving a sheriff's deed, had destroyed all mutuality. To establish no surplus, he relied on the statement made by his associate counsel in opening. He admitted the general rule as to the redeemability attached to mortgages, but contended, that defeasible purchases were an exception to it, as they did not rest on a borrowing and lending, and the mere agreement to permit a repurchase of such an interest as a class-right, which was only a *chose in action*, could not, he said, operate as a mortgage.

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Per Curiam, delivered by KENT, Ch. J. It will not be requisite to recapitulate minutely the facts in the cause, but I apprehend it will be sufficient to state the points that have been raised for our consideration, and to apply the material facts to those points, as we proceed to discuss them.

The appellant contends that the decree is erroneous; 1st. In making the proceeds of the sale of the *Clabergh* farm any basis for an account; and, 2d. In allowing the respondent a right of redemption as to the assignment of the class-rights, for 1,400 acres of land.

1st. The accounts between the parties relative to the bond and mortgage, do not appear to have been kept with much regularity or precision, and it would be difficult from the facts before us, to make an accurate liquidation of those accounts. Nor do I think it necessary so to do, for I agree with the court below, in the propriety of considering the accounts relating to the mortgage as closed, and that the mortgage is to be considered as satisfied. It is equally needless to determine, whether the agreement to *divide the surplus moneys arising upon the sale of the farm (if any such agreement was made) be valid and binding upon

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the parties, for I am satisfied there was no surplus moneys to divide. The balance due upon the bond at the time of the sale must have amounted to 500*l.* and upwards, the sum at which the farm was afterwards sold to *Effener*, and that, too, after allowing as a credit, the sum specified, as the consideration of the assignment of the class-rights. With respect to that consideration, I think it is clear, that it was not created by the advance of cash from the appellant to the respondent. The answer of the respondent does not pretend it was, and this must be the sum which the appellant, at the time of sale, admitted ought to have been credited on the bond. The assignment, therefore, of the class-rights, must have been taken by the appellant, as equivalent to the payment of 100*l.* upon the bond.

This brings me to the consideration of the second point. Whether the respondent be entitled to redeem? I consider the assignment of the class-rights as being intended by the parties to operate as the payment of 100*l.* on the bond and mortgage. It was not given, or accepted, absolutely as cash, but as a security for the payment of so much of the antecedent debt, and, therefore, I entirely agree with the Chancellor, that it is not to be considered in the light of a defeasible purchase, but as an additional security for a part of the pre-existent debt, and to which the right of redemption was necessarily attached. I entertain a full persuasion that this is a just solution; the real truth of the transaction. The internal evidence of the case is, to my mind, conclusive as to the fact. I have no doubt that

* 141 this mode *of securing the payment of 100*l.* in part satisfaction of the execution, was the cause why proceedings under the execution, were stayed from *September*, 1789, when the assignment was made, until *September*, 1790, when the respondent made default in the redemption of his class-rights. I am of opinion, therefore, that a right of redemption most justly and equitably attaches to this case.

The few cases that are to be met with, of defeasible purchases, and in which the equity of redemption is said to be destroyed, after the limited time, by agreement of the parties, are cases in which there was a great lapse of time between the forfeiture and the application to redeem. *Floyer* v. *Lavington*, 1 *P. Wms.* 268. *Ensworth* v. *Griffith*, 1 *Bro. Parl. Ca.* 149. *Tasburgh* v. *Echlin*, 4 *Bro. Parl. Ca.* 142. 1 *Pow. on Mort.* 4 ed. 169 to 184.; and Mr. *Powell* admits, in page 183. that the intention of the parties must be clearly proved, or necessarily implied, otherwise they will not be taken out of the operation of the general rule. The intention of the present parties is so far from appearing to make this assignment a defeasible purchase, as contradistinguished from a collateral security for a debt, that it is manifest, from a review of the case, that the assignment was made to secure 100*l.* as part of the bond, and by that means the respondent obtained the indulgence of another year to meet the execution.

My opinion, therefore, is, that the decree is correct in attaching the right of redemption to the interest assigned; but as the 1,400 acres have since been sold by the appellant, and, as we must intend, to a *bona fide* purchaser without notice, the only *question is, as to the measure of * 142
compensation which the respondent is entitled to receive.

It will be perceived, from the view I have taken of the transaction, that the respondent is not entitled to redeem, without paying to the appellant the 100*l.* with interest from the date of the assignment. That sum, therefore, must be deducted from the amount of his compensation. The only point of any difficulty is that of settling the time at which the value of the 1,400 acres is to be computed. If the appellant had retained the lands till 1796, when the respondent demanded a release of them, he would have been obliged to restore the lands, or their *then* value, exclusive of improvements; but he had previously sold them to a third person for 500*l.* which he states to have been the highest price which could be obtained, and that when he

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sold them, he did not suppose the respondent had, or pretended to have, any claim to the lands. As the respondent assigns no reason why he lay by till 1796, I incline to the opinion, that, under the circumstances of this case, the price that the appellant procured for the lands, would form the most equitable rule of computation. He appears to have sold the lands, under a belief that they were absolutely his.

My opinion accordingly is, that the appellant be decreed to account to the respondent for 500*l.* being the sum for which he sold the 1,400 acres, together with interest from the time of the sale, which was on the 1st *December*, 1792, and costs both in this court and the court below, and that the appellant be allowed against that sum 100*l.* with interest from the 19th of *September*, 1789, and that the court below be directed *to execute this decree, and that the decree below, be, in all other respects, reversed.

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Judgment accordingly.

William and George Taylor, Appellants, *against* Ann Delancy, Respondent.

The surrogate has a discretionary power to elect out of those of the next of kin to an intestate, any one in an equal degree, and grant to such person, sole administration.

ON appeal from a decree of the judge of probates, on the following facts.

John Taylor died intestate, leaving a widow, three sons, *William*, *George*, and *Charles*, and three daughters, *Ann*, the respondent, *Phœbe* and *Mary*. The widow having renounced the administration, the two daughters, *Phœbe* and *Mary*, united with their husbands in petitioning the surrogate to appoint *Ann* sole administratrix, she being the eldest child. Against this, *William* entered a *caveat*, claiming a right to be joined with her, which she denied. Whilst the *caveat* was pending, the four other children presented to the surrogate an *ex parte* paper, stating as objections to

William, 1st. That he was so much engaged in commerce, as not to have time to attend to the estate; 2d. That the family could not, at all times, have access to him, which, if he was an administrator, would be inconvenient; 3d. That he was at variance with the other branches of the family, and his temper such as to promote discord rather than harmony; 4th. That they were persuaded, it would be his object and *interest*, to delay a settlement of the estate; 5th. Because the law does not favour joint administrations.

The surrogate, under these circumstances, decreed administration to be granted, exclusively, to *Ann*. From this, *William* appealed to the judge of probates, and on the proceedings being transmitted, *George* petitioned to be united with any person to whom the administration might be granted. His honour, having affirmed the decree of the surrogate, directed sole administration to *Ann*, on which the case was now brought before this court. * 144

Henry, for the appellants. This case brings up two question: 1st. Whether a surrogate has a discretionary right to elect, among persons in equal degree, to whom he will commit administration? 2d. Whether, admitting this discretion, it has, on the present occasion, been duly exercised? To determine the first point, it will be necessary to investigate the origin of the power, now conferred on the surrogate, in granting administration; to trace from it its common law source, to the statute provisions in *England*, and mark the diversity in them, from the act of our legislature on the subject.

Antecedent to parliamentary provisions, the king, in cases of intestacy, as *parens patriæ*, was entitled to the goods of the deceased, in order to defray the expenses of his funeral, discharge his debts, and apply them to the benefit of his wife and children. If there were none, those goods, as a branch of the royal prerogative, constituted a part of his revenue, which he obtained possession of by his

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ministers, and, most probably, through the medium of the county courts. At length, through the influence of ecclesiastical persons, the administration of intestates' effects was granted to the ordinary, who, after giving one third to the widow and children, was imagined to dispose of the residue, or dead man's part, in *pios usus*, for the *benefit of his soul. The abuses, however, of the clergy, called for legislative interposition, and it was by the 31 *Edw.* III. c. 11. enacted, that the ordinary should grant administration to the "next and most lawful friends" of the deceased. This was construed to mean such of the next in blood, as did not labour under legal disabilities. What those were, are specified in *Hensloe's* case, 9 *Rep.* 39. and *Toller's Law of Exec.* 66. But the ingenuity of the churchmen attempted to narrow this right, by choosing from among those of the next of kin, him who would purchase the favour, or be most obsequious to them in the distribution. This power of election being a doubtful right, the 21 *Hen.* VIII. c. 5. was passed to confer it. By the words of the statute, the ordinary is empowered to grant administration to the widow or next of kin, or both "*as by the discretion of the same ordinary* shall be thought good. And in case, where divers claim the administration, which be in equal degree of kindred to the person deceased, and where any person only desireth the administration, as next of kin, where, indeed, divers persons be in equality of kindred, as is aforesaid; that in every such case, the ordinary to be *at his election and liberty to accept any one or more* making request, where divers do require the administration." This statute is, by *Blackstone*,† termed an enlarging act. It was passed to give privileges to the church, and confirm that power of election, which they before used, though with some degree of distrust, of nominating the most pliable of the kindred, to the administration. It was a boon to the ecclesiastical *order. It was the abuse of it which induced the statute of distributions‡ to put an end to those frauds which had been practised under the former laws. After

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† 2 *Comm.* 496.

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‡ 22 & 23 *Car.* II. c. 10.

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this plain history of the right of election in the ordinary to exclude some and prefer others to the office of administration, can it be argued that it was bestowed to avoid the inconvenience of joint administrations? It is not the result of common law principles, but the effect of positive institution; and if our act does not bestow the same discretion, it cannot exist. The words made use of by our legislature are, that administration of the estate of any person dying intestate, shall be granted "to the widow, or next of kin of the intestate, or some of them, *if they*, or any of them, will accept the same."† These expressions do not vest the surrogate with a discretionary power to elect one of the next of kin solely, and in exclusion of those who "will accept the same." The sentence, if at full length, would read thus, "to the next of kin if they will accept the same, to some of them, if any of them will accept the same." Therefore, if all in the same degree accept the administration, the surrogate must grant it; if, indeed, all do not choose to accept, then he may grant to some. The law is mandatory, and does not allow of any discretion. That this was the intention of those who framed and revised it, is evident, from comparing the phraseology of the old act, with that of the present day. By the former, the ordinary was empowered to grant administration "to the widow or next of kin of the intestate, or to some, *or one of them*, if they or any, *or either* of them will accept the same."‡ *No such words are to be found in our amended code, and it is not to be presumed they were rejected without reason. The sixth section of the act now in force, corroborates our positions. For it requires all the next of kin to be cited, in case any other person should apply for administration. Why cite them if all were not entitled? No inconvenience can arise from the bonds required, because each administrator is allowed to find his own separate surety. As to the second point, we surely are justified in saying, though the surrogate may be entitled to the discretion he claims, he has, in the instance now be-

† 1 *Rev. Laws* 318. s. 5.

‡ *Gaine's* fol. ed. * 147

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fore the court, abused it. Our system allows, it is true, to its judges, the exercise, in some instances, of their discretion; but then it must be such a one as is sound and lawful, not arbitrary and capricious. Therefore, if once duly made use of, it can never be revoked, and administration granted to another; for that would be arbitrary. 11 *Vin. Abr.* 114. *pl.* 10. (*n*). Men, and even a mercantile character, have been passed by, to grant administration to a woman, whose education and very sex must be against the appointment. This last circumstance has been said, of itself, to be an objection, because, "she may marry, and so put herself and her goods under the power of another." 12 *Mod.* 619.† Should the court be of opinion with us, they will, therefore, grant the administration, as we suggest, to all who will accept; for, in cases of this sort, when the decision appealed from is set aside, the inferior tribunal is ousted of its jurisdiction, and the court which reverses, shall grant administration *de novo*. *Reeve* v. *Denny*, 11 *Vin. Abr.* 76. *pl.* 12.

† *Blackborough* v. *Davis.*

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**Harison* and *Van Vechten*, contra. The rights of the appellants rest entirely on our statute provisions, and it is, therefore, unnecessary to travel back into the remote periods of ecclesiastical abuse. Antecedent to the general repeal‡ of the *English* acts of parliament, those of *Edw.* III. and *Hen.* VIII. were in use here. When they were abrogated, it was not from any view inimical to their spirit, but to adopt the same principles under an act of our own. The existing act of the legislature is to be expounded according to the reason of the antecedent law, and never to be construed to repeal, further than that reason will justify. The discretion now practised by the surrogate has been sanctioned by a usage of years. Nothing but a clear intent ought, therefore, to abolish it, instead of the constructive alteration which the counsel for the appellant has laboured. By being authorized to grant to *some*, the surrogate is necessarily empowered to refuse to bestow on all.

‡ 1 *Rev. Laws*, 358. s. 28.

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The words of the law clearly mean, that he may grant administration to any, or any one of those who are next of kin, or to any one of them who will accept the same. When we look at the former law, which it was not intended to depart from, we can easily perceive that the "any" must signify any *one*, at his election. This power of election is indispensably necessary. Persons next of kin may be under disabilities, which would render it almost criminal in the surrogate not to reject. They may be bankrupts, or largely indebted to the intestate. Without a discretion, therefore, he could not do justice to the estate. But that appointing a woman should be an abuse of it is rather singular, when the legislature, in the case of a widow, direct it to be given to her. If we are correct in our idea of a discretion *in the surrogate, the appeal cannot be maintained. From the use of discretionary powers there is none. It is contrary to their nature. On applications for new trials, setting aside defaults, rehearings in chancery, allowing or directing informations in the nature of a *quo warranto*, no exception can be taken, or writ of error brought. They may, indeed, be subjects of criminal proceeding, by indictment or impeachment, but never can be the groundwork of appeal or error. The *argumentum ab inconvenienti* is conclusive against the right. An instance has very lately occurred in the city of *New-York* of a death, where the next of kin consisted of 150 persons, all in the same degree. This alone is sufficient to affirm the decree below.

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Pendleton, in reply. We must construe the clause in our statute distributively. To the next of kin, if they will accept, or some of them if they will, or any of them if they will accept the same. It is a positive law, and however inconvenient, it is not with this, or any other court to repeal it.

Per Curiam, delivered by SPENCER, J. The appellants' counsel have insisted, 1st. That under the 5th section of

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the act, "relative to the court of probates, the office of surrogate, and the granting of administrations," there is no discretion vested in the surrogate, to select one of the next of kin in equal degree, where they all request administration, and are under no legal disability; 2d. That in this case, if such discretionary power is given by the act, it has been so exercised as to require correction by this court.

* 150 The only legislative provisions on this subject, are to be found in the acts of the 14th of *February*, 1787, *and the 27th of *March*, 1801. The former of these statutes directs, "that where any person dieth intestate, the widow, or next of kin, *or any of them*, of the deceased person, if they, or either of them will accept the same, &c. shall be deputed." The latter statute ordains, "that administration of the goods, and chattels, and credits of any person dying intestate, shall be granted to the widow, or next of kin of the intestate, or some of them, if they, or any of them, will accept the same." These acts are of the description of revised laws, and if susceptible of doubt in their interpretation, resort must be had to the law existing antecedently. By the constitution, the *British* statute of the 21st *Hen.* VIII. regulating the granting of administrations was adopted and recognised as the law of the state. The 35th article of the constitution ordains, that such parts of the common law of *England*, and of the statute law of *England* and *Great Britain*, and of the acts of the legislature of the colony, as together did form the law of the said colony, on the 19th of *April*, 1775, should be and continue the law of this state, subject to such alterations and provisions as the legislature should from time to time make concerning the same. The statute of the 21st *Hen.* VIII. became thereby the law of the state, and the 5th chap. 3d and 4th sections of that statute, in express terms, gave to the ordinary a right to accept one or more administrators when there was an equality of kindred, according to his discretion. The revisers of the laws in 1787, well knew

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that this statute vested a discretion, and still we find no terms made use of negativing that discretion, or purporting to change the law. So far from this, it appears to me *that the words "or any of them," in the act of 1787, if they were now to receive a construction for the first time, confer a discretion on the surrogate. My opinion is founded on this proposition, that where the law, antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change. A contrary construction might be productive of the most dangerous consequences. The quaintness of expression in some of the ancient *British* statutes, the circumstance of there being several statutes on the same subject, required, in many cases, an entire change of language, but it has never, until now, been contended, that thereby an alteration of the law was to be inferred.

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If this was a case wholly depending on the statutory provision, of the act of the 27th of *March*, 1801, (and to this as a revised law, the same observations are applicable, as have been made in relation to the statute of the 14th of *February*, 1787,) I should incline to the opinion, that the words, "or any of them," would vest a discretionary power in the surrogate, of making an election between those in equal degree. If, however, the words are doubtful, arguments from inconvenience would have a decisive and conclusive influence. Nothing could be more absurd than to require the surrogates to confer the right of administering on all who are next of kin, and who may desire it, when their numbers, their residence, their personal qualifications would, in prudence, require their exclusion. I am, therefore, clearly of opinion, *that the surrogate had a discretionary power of selecting one to the exclusion of others, by which I mean a sound legal discretion not founded in whim or caprice.

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As to the second point, whether the abuse of discretion is a ground of relief here. I am not disposed to say, that there may not be cases, where the exercise of a discretion in an unjust and illegal manner, would not be re-examinable and relievable. Of this there may be a doubt, and in the case of *Preston and others* v. *Ferrard*, 2 *Bro. Parl. Ca.* 179. the house of lords affirmed the Chancellor's order, on the ground that the act of 2d of *Anne*, had conferred on him a discretionary power to appoint guardians to the children of *Roman Catholics*. Without expressing a decided opinion on this point, it appears to me that the present case furnishes no facts from which the court can perceive an abuse of discretion. It is to be intended, that all decrees, solemnly pronounced, are just, until the contrary appears. The surrogate may have had good reasons to guide his discretion, of which we are not conusant. Neither of the parties, from any proofs in this cause, appear liable to any objection, except that the respondent is a female; and this has been urged as one. It is a sufficient answer, to say, that the statute makes no discrimination as to the sexes; and certainly, the court cannot consider that an objection, which the legislature have not. In my opinion, the decree appealed from ought to be affirmed.

Decree of affirmance.

* 153 *Paschal N. Smith, President of the Columbian Insurance Company, *against* William Bell, Joseph Bell, and Samuel Watson.

To constitute a technical total loss of a ship, by damage, from the perils insured against, she must be injured to the amount of half her value, or more, after deducting the one-third, new for old, allowed the underwriter; that is, she must be injured to the extent of three-fourths of her value, or more.

IN error, upon a bill of exceptions, tendered and sealed on the trial of this cause, at the circuit court, in the city of *New-York*, in which the now defendants were plaintiffs.

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The action was on a policy of insurance on the ship *Mary-Ann*, valued† at 14,000 dollars, "at and from *Charleston* to *Glasgow*, and at and from thence to *Philadelphia*, or one other port in the *United States*." The plaintiffs went for a technical total loss, in consequence of the vessel's having been stranded on the coast of *Scotland*, and injured to an extent which required 7,221 dollars to repair. They gave in evidence a subsequent sale of the vessel at *Greenock*, on account of those who might be concerned, the purchase by the firm of *Archibald Campbell & Co.* and her reparation at an expense exceeding half her value. The defendants relied on their having paid into court the sum of 5,100 dollars, contending, that as the amount of expenditure for repairs was only 7,221 dollars, and they were entitled to a deduction of one-third, new for old, they were chargeable with only 4,884 dollars 32 cents, which, not amounting to half the value of the vessel, could not constitute a technical total loss. That, therefore, as they had paid into court, 5,100 dollars, the verdict ought to be in their favour, it being the law, that the allowance* of one-third, new for old, should be made, before the right of recovering as for a technical total loss, on account of damage sustained under the policy, could arise.

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The judge, however, at *nisi prius*, thinking otherwise, the verdict was, under his direction, given for the plaintiffs, and the case now came up on this single question; whether the underwriter on a ship is liable for a total loss, when the injury she receives from the perils insured against, deteriorate her more than half, without deducting the one-third, new for old; or, whether the one-third, new for old, must not first be allowed the insurer, and the injury, after that deduction, amount to the half her worth, or more?†

† I was not present at the argument.

The determination at *nisi prius*, was founded on a decision of the supreme court, in the case of *Dupuy* v. *United*

† There is some uncertainty as to this in the printed case. The first page states it to be an open policy; the second, that "in and by" the policy she was "valued at," &c.

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Insurance Company, in which, from the notes of KENT, Ch. J. it appears the court ruled to this effect.

Where the repairs are equal to half the value, and more, the insured have a right to abandon. The rule is general, and has no reference to the distinction of new for old. It is the actual expenditure, or damage which is taken into view, and on the abandonment, the insurer has all the benefit of the repairs. The rule of deducting one third, new for old, can be applied only in a case of partial loss. Here there was a clear case for abandonment, and the plaintiff must have judgment.

Per Curiam, delivered by LANSING, Chancellor. On this case, only two questions are presented for the consideration of the court. 1st. Whether, on a policy of insurance, on the estimate of repairs of a *vessel, injured by any of the perils insured against, new materials substituted for the old, do not entitle the insurer to an allowance? And if so, 2d. At what period is the allowance to be admitted?

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These questions are open here. They must, in a great measure, depend upon general reasoning, drawn from the nature of the contract of insurance, and that reasoning may be comprised in very narrow limits

The vessels employed in commercial enterprises, are of various degrees of strength and durability, and more or less adapted to resist the perils of the seas; but the lowest grade in which they are recognised, as subjects of insurance, is when they are barely seaworthy.

The hull, masts, sails and rigging of a vessel may be in a situation to constitute her seaworthy, and yet be much inferior to what they were when they came from the hands of the workmen who constructed them; and a regular gradation may easily be conceived between a vessel perfectly new, well-built, rigged and furnished, and one that is barely seaworthy. When an injury is sustained by a vessel of the latter description, and it becomes necessary to supply her old masts, timbers, sails and rigging, with new,

it is evident that in all these particulars, she must, in most instances, be placed in a better state by the repairs, than she was before the injury received, the ordinary wear and tear not being within the purview of the policy. Hence, the repairs are carried to a point beyond the mere reinstatement of the vessel, and beyond the indemnity intended.

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*In the case of *Da Costa* v. *Newnham*,† determined in the *British* court of *king's bench*, since the revolution, the usage which obtained with respect to the repairs of allowing one-third, new for old, seems to have been acknowledged, and it is now urged in argument, that at any rate, whether or not the defendant was entitled to this allowance, was a question for the jury, *as it depended upon usage*. *Buller*, Justice, speaks of it as a usual allowance, and *Ashhurst*, J. observes, that the allowance of one-third of the repairs, *is the rule*, where the ship is repaired and delivered over again to the owner, for his benefit. That case arose on a technical total loss, which the insured did not avail himself of, by abandoning. The recovery was for an average loss of upwards of eighty *per cent*. The ship had been repaired at the instance of the insurers. They refusing to pay for the repairs, a bottomry bond was executed on the vessel, in consequence of which, she was sold to satisfy the debt.

† 2 *D. & E.* 407. 413. 411.

It was contended that the value of one-third of the repairs ought to be deducted, and the answer to this, which appears to me conclusive, was, that the repairs, having added to the value of the vessel, must have been compensated for, in the sale, on the bottomry bond, and the owners never had the ship, so they could not be the better for the repairs.

From the expressions made use of by the judges who decided this case, it does not appear that they relied upon the usage of any *particular* trade; but upon the usage of trade generally; and as there is no power on earth, to enact positive regulations for the *wide extended regions of ma- * 157

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rine enterprises, general usage, established from the principles of general convenience, and sanctioned by the experience and practice of merchants, is the only source of general maritime law.

The rule that constitutes the loss of more than one-half the value of the subject insured, a total loss, is a positive one, originating in the convenience of having a determinate and precise test n all cas es, which, by its universality and uniformity, may render inquiries into minute objects, rather calculated to perplex than to elucidate, unnecessary.

The precise difference between the value of the old and new materials, must generally be difficult to ascertain. That difficulty is much increased, by the estimate necessarily required of the value of the old, at the home port, and of the new, at the port of repair. It is, therefore, desirable, to have some invariable standard, not calculated, for that is impracticable, to meet precisely all the variety of cases, which may occur, so as to render exact justice in each; but such a rule as will nearest approximate to producing that effect, if generally applied. That effect, if a rule respecting the subject is to obtain, it was not contended, might not be produced in the proportion alluded to in the case of *Da Costa* v. *Newnham*. From the nature of the contract of insurance, I think the allowance for replacing the old materials with the new, is reasonable and proper; and if so, that, as the deduction is professedly made, on the principle that the value of the subject insured, has been enhanced to that amount, that deduction ought to be made, before the test of technical total loss or *not is applied; for the doctrine of technical total loss is expressly founded on the position that the subject insured, has been deteriorated more than one-half.

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I am, therefore, of opinion, that the judgment of the supreme court be reversed.

Judgment of reversal.

Paschal N. Smith *against* Joaquim L. Steinbach.

IN error upon a judgment pronounced by the supreme court† in favour of the defendant, on a demurrer to evidence.

The count averred a loss under the policy from arrest and detention by the *Spanish* government. The testimony to support this, and demurred to on the trial, showed an insurance on the freight of the ship *Catharine*, then at *Barcelona*, effected on the 23d of *October*, 1800; a seizure of the vessel by the *Spanish* government, in the *September* preceding, on suspicion, that "the captain had aided a *British* frigate, in cutting out, and capturing two *Dutch* vessels." An abandonment on the 30th day of *December*, 1801, between which time and *September*, 1800, a witness, examined in the cause, proved that opportunities from *Barcelona* to *New-York* were frequent, and had occurred. Lastly, a subsisting detention in *July*, 1802.

A policy on freight at and "from" a foreign port, attaches on the commencement of lading the goods on board. A vessel seized on suspicion of a breach of neutrality is not, from such a circumstance, to be held guilty of a breach of neutral conduct. An abandonment is never too late if the loss continue total at the time of the action brought. A demurrer to evidence confesses every fact which the jury could have found from the evidence. A seizure by a foreign state, of a vessel in a port of that state under a suspicion of a breach of neutrality, is a loss within the clause in a policy of insurance against the restraint of princes, &c.

KENT, Ch. J. read the opinion of the supreme court as delivered by *Livingston*, J. from 2 *N. Y. T. R.* *130.

Mr. *President*. Several objections were made to the plaintiff's right of recovering. 1st. It was alleged that the voyage contemplated, while the *Catharine* was at *Barcelona*, was different from the one insured, and that therefore the risk never commenced. The insurance being *at* and from *Barcelona*, it may admit of doubt, whether, as the loss happened there, the defendant would not be liable, although a voyage to the *Havanna* were in contemplation. But on this point of law, we gave no opinion, because it was sufficiently proved, that the vessel was destined for *Baltimore*. Thus have the jury found, in another action on a policy on the ship, nor could their verdict have been different, without disregarding all the testimony in the

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† *See* 2. *N. Y. T. R.* 129 *to* 134.

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cause. The defendants themselves were awarethat this finding comported with the evidence, and, accordingly, directed their principal attack against the testimony itself; for they said, 2d. That *Mumford* was the plaintiff's witness, and therefore could not be discredited by him. Whether this gentleman be regarded as the witness of the one or of the other party, is not very material in deciding this cause: he had been examined out of court, at the instance of the defendants, and cross-examined by the plaintiff, who produced his deposition on the trial. Perhaps the best general rule in such cases would be, to consider the witness, if his deposition be read, as belonging to the party on whose application he was examined, without any regard to the person who may finally make use of it. But without deciding this point, we thought nothing was done by the plaintiff to discredit *Mumford*, even if he had been his witness. It is not every mistake which a witness may make, when speaking from memory, that will discredit

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him, *and it would be a strange rule, indeed, that a party producing a witness, should not be permitted, even by the witness himself, to correct a mistake which he may have committed. Nothing more was done. *Mumford* had sworn, that from certain papers, the destination of the cargo, according to his recollection, appeared to be for the *Havanna:* after this, there could be no impropriety in showing him the papers to which he alluded, or any other to refresh his memory, and to enable him to correct his error if he had made one. This was no imputation on his character; it neither rendered him infamous, nor unworthy of credit as to the other point to which he had deposed: It discovered in the witness a laudable promptitude to rectify a mistake, into which an imperfect recollection had betrayed him, and thus added to, rather than detracted from, the weight of his testimony. 3d. The exhibits B. and C. being only copies, should not, it was said, have been produced. If no allusion had been made to these papers by

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Mumford, they could not have been produced, to show the real object of this voyage, but he had already testified that he had made out certain claims against the *Spanish* government, for the *Catharine* and her cargo, which stated the vessel to be bound directly for the *West Indies;* these papers, he added, were lodged in the consulate office at *Barcelona*. Having sworn thus far from memory, the plaintiff had a right to refresh his recollection, by the showing him copies of the claims referred to; on inspection, he might probably be able to determine whether they were true copies or not, and certainly if he believed them true, they would furnish better evidence *of what the originals contained, than any parol account of their contents, which was the only way in which the defendants had attempted to prove them. There is no reason to say the originals were in the plaintiff's possession. They remained in a public office in *Spain:* and this kind of inferior proof was rendered proper by the defendants' own conduct. They had not only examined the witness, as to the contents of these papers, but gave the plaintiff every reason to believe, that nothing would be required of him, but proof that the property was *American*. 4th. The abandonment, it was said, was too late. The *Catharine* was seized in *September*, 1800, and not abandoned until fifteen months thereafter. It has already been decided by the supreme court, in *Earl* v. *Shaw*, that an abandonment may be made at any time after the accident; provided, at the date of the abandonment, the loss still continue total. This being the case here, the abandonment was in season. 5th. It is contended, that Mr. *Mumford* was mistaken or surprised on his cross-examination, and that, therefore, a new trial should be had. For this purpose, his affidavit was produced, taken nine months after the trial, in which he stated, that the captions of the exhibits B. and C. were not shown to him, to the best of his knowledge and belief, and endeavoured to explain why they were made as they appeared; to wit, to prevent endangering the insurance. This explanation

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came too late; a witness under examination may explain and correct himself, but it would be dangerous and improper to receive any elucidation from him, after the trial, and especially after the lapse of so many months: besides, the defendants were apprized of his deposition, long *before the trial, and were without excuse, for not calling on him then, to make such explanations as might have been deemed important. 6th. But it was said there had been a discovery of new evidence, and for that reason there should be another trial. It was also said, that if a new trial had been granted, there were two witnesses who were not known to the defendants at the time of the trial, who could testify as to the destination of the *Catharine*. This was the fact principally controverted on the former trial, and we were applied to for another, merely because all the witnesses who knew something of the matter, had not been examined.† Every one must perceive the inconvenience and delay which would arise from granting new trials, upon the discovery of new testimony, or other witnesses to the *same* fact. It often happens, that neither party knows all the persons who may be acquainted with some of the circumstances relating to the point in controversy; if a suggestion, then, of the present kind be listened to, a second, if not a third and a fourth trial, may always be had: there may be many persons yet unknown to the defendants, who may be material witnesses in this cause, and this may continue to be the case after a dozen trials. Cases may occur in which, if great doubts exist, as to the first decision, it may be proper, on the discovery of further witnesses, even to the same fact, to open the cause for a second discussion; but this is not one of them. The principal fact here was clearly proved, and if *Lewis* and *Byrnes* had both been examined, it is very uncertain whether the result would not have been the same.

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† It is no ground for the court to grant a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, where another witness who was called, established the same fact, and the defence proceeded upon a collateral point on which the verdict turned. *Edwards* v. *Evans*, 3 *East*, 451.

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Pendleton, for the plaintiff. The effect of a demurrer to evidence is, that the demurrant, admitting all the facts which appear in evidence on the trial, still says they are

not sufficient to entitle the party who produces them, to recover or maintain the issue. The proceeding is founded on this principle, that where facts are agreed on, there is no occasion for the determination of a jury; for, all that is then necessary, is to pronounce the law on them. But when the facts are not agreed to, then they go to a jury to determine their existence. In this case the facts stated are acknowledged. The court is now to decide whether every fact necessary to entitle to a recovery for the loss claimed, has been proved. If not, we think ourselves justified in saying there must be a reversal; because it is, in all actions, the duty of a plaintiff to make good his claim, it being never required of a defendant, to show negatively, that there is no title to a recovery. An insured, then, ought to establish, that the subject matter was at the risk of the underwriter; that it was in such a situation, as to be within the terms of the policy, and the nature of the loss such as will authorize a resort to the assurer. On the present occasion, it should have been made to appear, not only that the *Catharine* was at *Barcelona*, but bound to *Baltimore*, on the voyage insured, and that under these circumstances, she was seized. To this, the proof is inadequate. For, though the being at *Barcelona*, and the seizure are established, there is a defect in the testimony, as to the port of destination; unless, indeed, the court may infer that the *Catharine* was to go on the voyage described, *merely from her being at the port from whence insured. This can never be a matter of inference, for it is laid down, that "the loss must *appear* to have happened during the continuance of the risk." *Marsh.* 615. In *Wooldridge* v. *Boydell*, *Doug.* 16. the words were "*at* and from *Maryland* to *Cadiz*," but because it was not shown that the vessel was bound on the voyage insured, it was held that the policy did not attach, and the plaintiff not entitled to recover. The same principle is found in *Murdock* v. *Potts*, *Marsh.* 230. The mere being *at* a port does not comprehend sufficient proof that the vessel was there for the pur-

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pose of pursuing the voyage described. Though a demurrer to evidence admits the facts proved, it does not warrant the presumption of a fact not in evidence. If such may be inferred, the party demurred to should specify them, and is not bound to join in demurrer till they be admitted or proved. If, however, such fact be material for the determination of the cause, as it neither admitted nor proved, but only inferred, there should be a *venire de novo* directed. This, however, is not that on which we principally rely. We contend, that as the plaintiff founds his claim on a seizure upon suspicion of an act of his agent, which, if true, would amount to a violation of neutrality, and vacate the policy, he was bound also to establish that there was no ground for the suspicion. Not having done so, and joining in demurrer, he has admitted the cause of suspicion to be well founded, and cannot, therefore, recover. We insist also, that the rule adopted in the supreme court of allowing the underwriter at any period to bring his action,
* 165 and recover *as for a total loss, if the loss then continue total, is erroneous. The principle of insurance law is, that the assured, when informed of an event by which he is entitled to abandon, ought to elect to do so within a reasonable time. If within such time this be not done, it is to be presumed that he has elected not to abandon, and the underwriter will be liable only to an average loss. In *Marshall*, 508. the rule on this subject is accurately stated. He says, "that as soon as the insured receives advice of a total loss, he must make his election, whether he will abandon or not. If he determine to abandon, he must give the underwriters notice of this, within *a reasonable time*, after the intelligence arrives; and any unnecessary delay in giving this notice, will amount to a waiver of his right to abandon; for unless the owner does some act, signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage." This doctrine is justified by reason, as well as authority. Abandonment is the act by which the as-

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sured transfers to the underwriter the chance of recovering what is saved, and calls upon him as if the subject insured had been totally lost. For where there has been an actual total loss, there can be no abandonment. For it is founded on a supposition that something has been saved, or may be so. It is, however, an extreme remedy, and allowable only in extreme cases. If the property be in such a situation, that it may be recovered, the equity of the law says, we will not oblige the assured to wait the event, but we will permit him to call on his underwriter, who shall take the chance of recovery. Hence, it is optional, whether *an insured will abandon or not. "The insured is not obliged to abandon in any case. He has an election." *Per* Lord *Mansfield*, *Marsh.* 494.† But his election is a positive act, of which notice must be given, in order to place the underwriter in a situation to look after the property. What act is to be done to evince the intention of not abandoning. None that is overt. It can be manifested only by being passive. Therefore, abstaining from abandoning, must be an election not to abandon. Proceeding in attempts to recover the property, is evidence that an abandonment of it was never contemplated, and an indemnity for the expenses incurred, all that was looked forward to. Fourteen months passed without any notice taken of the accident. After such a lapse of time, it is to be presumed, that the party has elected to run, himself, the chance of recovery. If not, and no limitation be put to the period within which an insured must elect, it can never be known to an underwriter, when his responsibility ceases; it may last for ever. The convenience of the thing, therefore, requires, that abandonments should be allowed only within a reasonable time, and *that* should be limited by the period within which communication is in general received, unless it be shown that none has arrived. The contrary doctrine opens a door to fraud, and affords an opportunity to speculate on the underwriter. Under a particular clause in our policies, the underwriter is to pay

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† In *Hamilton* v. *Mendez*.

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all charges incurred in defending the subject of his policy? Is the assured to go on for any length of time, involving his insurer to any amount of expenses, and if the property be recovered, take it to *himself, if not, claim for a total loss, and demand payment of the expenses also? Surely, where the whole of the subscription is to be required, the insurer ought to have a discretion allowed him, to pay the amount, and relinquish the pursuit. By such a system, the assured cannot suffer, though, by rejecting it, the assurer may. The underwriter has a right to insist on being put in a situation to act for himself, and not to have forced upon him an agent, whose interest it is to hazard every kind of expenditure, because, whatever may be the result, he cannot lose, and may gain. It is inequitable, that the underwritten should, at his pleasure, wait the termination of the accident, before he abandons, and yet the underwriter not be able to act for himself, but at the permission of the insured. He ought to be obliged to elect to abandon or not, before the consequences of the event are known, and not to be at liberty, without notice, to saddle the insurer with expenses and charges. No country leaves the period of abandonment totally in the breast of the underwritten. By many nations, the time within which to be made is expressly limited. But to leave it without bounds is held to be law in this state alone. The *English* decisions are in conformity to the principles I have advanced. In *Mitchell* v. *Edie*, *Marsh.* 510. Mr. Justice *Ashhurst* says, "the insured are bound to decide and signify their election to the underwriters the first opportunity; for though the person who takes upon him to act on the occasion, for the benefit of all concerned, is not the agent of the insured, yet, if, upon receiving notice of the loss, they do not elect to abandon, they adopt the acts of such person, and make him their agent." In another *case,† the having sent a letter of attorney to receive and remit the proceeds of a cargo sold, and lying in a court of admiralty, was held such an intermeddling as to destroy the right to abandon, for,

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† *Allwood* v. *Henkkell*, *Park* 172.

said Lord *Kenyon*, "the insured must make his election speedily, and put the underwriter in a situation to do what is necessary for the preservation of the property, whether sold or unsold." By the 42d art. of the marine, it is required to give instant notification of the loss, with a declaration of having elected to abandon, when the period allowed so to do, has expired. 2 *Emer.* 180. From this, it appears, that the principle we contend for, is acknowledged even by the law of *France*, which does not exact an immediate abandonment.

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Hoffman and *Harison*, contra. A demurrer to evidence not only admits every fact which has been offered in testimony, but every deduction which, from those facts, a jury *might* make. This is consonant to the reason of the thing. For, as by such a proceeding, the case is taken from the jury to the bench, the court is substituted in their place, and may make every inference they might draw. By adopting this mode of procedure, a party cannot deprive his adversary of any advantages a jury trial would afford. He concedes that they shall all be his, if the evidence be determined sufficient to maintain the issue. After the applicability and legal qualities of the testimony are allowed, the court pronounces the judgment in conformity to what they think a jury would have been warranted in determining. These principles have been settled in the *English* courts, by the case of *Cocksedge* v. *Fanshaw*, *Doug.* 119. and in ours, by that of *Livingston* v. *Shutz*. We contend *that the circumstances of a vessel being at a port, taking * 169
in her cargo there, and a policy effected on the freight to arise on that cargo, from the port where she was, to another, are sufficient to warrant an inference, that she was destined for the port to which insured. But we are told, that having shown a seizure on suspicion, we ought to have proved that suspicion to have been groundless, or it must be presumed it was well founded. This is contrary to every principle of law, and repugnant to the nature of the

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proceedings now before the court. 1st. As a matter of defence, it ought to be made appear by the now plaintiff. 2d. As the demurrer admits the fact of the seizure, it is to request a presumption against the plaintiff's own admission. He who demurs to evidence, asks nothing for himself, but denies that his opponent has shown any right. For a person tendering a demurrer, no presumption, therefore, can be made, as he concedes all presumptions are to be on the side of his adversary. That the right of abandonment is taken away, unless exercised immediately after notice of the loss, is not, as a universal rule, warranted by the cases cited. They establish no more than that, when the restoration of the property, or any other circumstance, shows the loss is no longer total, the assured cannot, by an abandonment *then* made, convert that which is at the time a partial into a total loss, merely because it had once technically subsisted. Thus, in *Mitchell* v. *Edie*, the vessel, after being captured and plundered, was restored, but, from the taking away of her rigging, obliged to make for a port of necessity, where the proceeds of the cargo were in the hands of a part owner for near three years, and the underwriters *called on merely because he had failed. The court held this a partial loss, not to be turned into a total one by abandonment. So in *Allwood* v. *Henkell*, the vessel was captured, recaptured, restored on salvage, and the money in the admiralty. The total loss had ceased, and, therefore, there could be no abandonment. On this principle, the determination of *Church* v. *Bedient & Kimberly*† proceeded. If, indeed, the underwriter has paid the loss, he then becomes a purchaser of the subject insured, and though it be afterwards recovered, it will belong to him. *Da Costa* v. *Firth*, 4 *Burr.* 1966. The consequence will be the same, though it be, in fact, restored at the time the amount of the subscription is paid. It is a fallacy, to say that the underwriter is injured by allowing of an abandonment, at any time, whilst the loss continues total. The assured is, by the policy, warranted in prosecuting for the

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† Vol. 1. 21.

recovery of the property. If he succeeds, it will go in diminution of the loss. If he do not, he has acted only according to his authority, and as the loss is then total, the underwriter is of course liable for the full amount. To adopt the rule contended for by the now plaintiff, would render almost every technical, a total loss. It would deprive the insurer of the agency of the insured, and oblige him always to send a special deputy to take care of his concerns. The property being originally that of the assured, he has a right to calculate when the abandonment is to be made.

Pendleton, in reply, referred to *Gibson* and *Johnson* v. *Hunter*, 2 *H. Black.* 187. in support of his positions respecting a demurrer to evidence, and insisted, *that the *spes recuperandi* was a part of the insurer's right, and ought to be abandoned to him. * 171

Per Curiam, delivered by LANSING, Chancellor. On this case, three points have been made. 1st. Whether there is proof that the freight is within the policy? 2d. Whether the insurer is bound to respond for the loss occasioned by a seizure, on suspicion of a breach of neutrality? 3d. Whether the abandonment was not too late to found any right or recovery on?

The plaintiff, by the demurrer to evidence, has admitted every fact which the jury could have found from the evidence.†

From the demurrer, it appears, that the defendant to maintain his issue, had proved that *De Covert*, on whose account the insurance was made, was owner of the vessel, the freight of which was insured by the policy; that he was an *American* citizen, and that the ship was purchased in the *United States* of an *American* citizen. It is further stated, that in the policy she was described as the *American* ship *Catharine*, and that the defendant had produced the necessary preliminary proofs before the policy was read.

† *Cockedge* v. *Fanshaw*, *Doug.* 127. *Livingston* v. *Shutz*, in this court.

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These preliminary proofs, among others, from the obvious import of the terms, must have been the evidence that the policy attached to the ship *Catharine*, and, of course, she was an *American* bottom. This has not been a point in controversy, but it is necessary to advert to it, in making certain deductions, which, I think, must determine the first point.

The policy, *on freight*, was on a voyage "*at and from Barcelona to Baltimore.*" The ship was seized in the harbour of *Barcelona.*

* 172 *It is laid down as a rule, that if an insurance be "*at and from*" a place, the risk commences from the time of subscribing the policy, if the ship is *at home.* If *abroad*, from the first moment of her arrival at the place specified.

2 *Marsh.* 615. *Tonge* v. *Watts*, 2 *Str.* 1251. An insurance on freight, commences at the time the goods are first on board. It has been held that an intention to deviate will not avoid the policy, and that a risk, once commenced, cannot be apportioned.

If these principles are correct, the policy attached on the freight the instant the goods were embarked at *Barcelona*, which, as related to the ship, was a foreign port. Whatever change in the destination of the vessel might have been contemplated, the risk having commenced, the insurer was entitled to the premium, and if the insured had, by changing the destination of the voyage, diminished the risk, by a deviation not warranted by the policy, he would have lost his money, without any correspondent benefit.

Until the destination of the vessel was actually altered, she was covered by the policy, and as she was at the port of departure, unless the contrary appears, it is to be presumed she was there for the purpose of pursuing her voyage to *Baltimore.*

As to the second point, I know of no instance in which bare suspicion has been considered as *proof* of *breach of neutrality.* It is the every day's practice of belligerents to capture and send into port, neutral vessels navigating the ocean, on the slightest suspicion, which the rapacity of

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the captors converts into confirmation so vehement as to amount to positive proof; but an allegation of the conviction by *the captors, of the truth of such suspicion, can form no ground for judicial decision, or to infer a breach of neutral duties. There is no other difference between this case and that of stopping a vessel on the seas, on suspicion, but that here, the seizure was in port, by an agent, more intimately connected with the government than those agents who search and send in vessels. But the suspicions of neither can be a guide to the tribunals of our country, (who only receive foreign judicial acts as *prima facie* evidence,) unless they have been proved to be well founded.

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Within the intent of the policy, this is a mere act of power, a restraint by a foreign prince.

The doctrine of abandonment is only adapted to the case of a *partial* loss, connected with a *total* one, by the operation of law. It is expressly founded on the consideration that the subject insured, though not totally annihilated, for then, nothing would be left for abandonment, is so much deteriorated by the perils insured against, as not to make it worth holding to the insured. It is a doctrine calculated to distinguish between average and technical total loss, as far as respects the insurer, not to create new duties, or impose new burthens on him, but to protect him from practices to which he might be exposed, by speculations on the state of the markets, or other contingencies, which may influence the value of the property insured.

The *English* doctrine on this subject laid down by Lord *Mansfield*, in the case of *Mitchell* v. *Edie*,† and afterwards adopted and confirmed by Lord *Kenyon*, in the case of *Allwood* v. *Henkell*,‡ and which appears to me well founded, is, that the insured must, *in the first instance, make their election whether they will abandon or not.

† 1 *D. & E.* 608.

‡ *Park*, 172.

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In the case of *Hamilton* and *Mendez*,§ Lord *Mansfield* observes, "the plaintiff's demand is for an indemnity; the action, then, must be founded on the nature of his damnification, *as it really is at the time of the action brought.*

§ 2 *Burr.* 1198.

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It is repugnant upon a contract of indemnity to recover as for a total loss, when the final event has decided, that the damnification, in truth, is an average, perhaps no loss at all." So this would be equally repugnant to the nature of the contract, to apply the doctrine of average loss, to a case in which the final event, as far as it has any bearing on the point in controversy between the parties, has determined it a real total loss. For the ship is still detained, and, if she was liberated, the freight which was the object of insurance, is as completely lost, as if she had been sunk in the ocean.

Whence, then, is the estimate of average loss to be taken? and what would the abandonment transfer, from the insured to the insurer?†

† 2 *Dal.* 280. *Cumberland* v. *M'Call.*

It is certainly not the interest of the insured to delay an abandonment. By doing so, he incurs many disadvantages. His rights on the policy are suspended, and any event which may restore the property insured, however much injured, places him in a situation to recover only an average loss.

Upon the whole, I am of opinion that the insured, when the loss on the policy happened, had it in his election to abandon. That by his delay he has waived his right of abandoning, so far as might operate to convert an average, into a total loss, and has left the insurer the chance of enjoying the advantage *arising from restoration, intermediate the time in which he waived it, and bringing his action, so as to preclude him from recovering for a technical total loss. But as the loss has continued *really total*, that the defendant had a right to recover, as for such total loss. I am, therefore, clearly of opinion, that the judgment of the supreme court is correct, and that it ought to be affirmed.

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Judgment of affirmance.

Le Roy and others, *Appellants*, *against* Servis and others, *Respondents*.

THE facts of this case are stated in vol. 1. p. 1. of the introductory cases, but as the opinion there is that of Mr. *Gold* only, the decision of the court is now given.

BENSON, J. I premise, that in a case otherwise properly cognisable in a court of law, if the plaintiff, for want of a *writing*, the evidence of his right, is obliged to sue in *equity*, it is a rule there that he must verify on *oath*, the allegation that the writing is lost, or in the possession of the defendant; that this rule is in the same reason with the rule in the courts of *law*, in cases of pleas to the jurisdiction, foreign pleas, and claims of cognisance, and is intended only to prevent a change or transfer of jurisdiction, without any cause shown as arising from facts proved on *oath*, and doth not diminish or deprive the defendant of any *real* advantage of *defence;* so, that the proof, although not absolutely *positive and conclusive, but less precise and * 176
full, will suffice. That in order to confine the rule to its *mere* object, if the bill is for *discovery* only, or if it is for a *general* discovery of *all* writings in the possession of the defendant, whatsoever they may be, and where it is to be supposed the plaintiff hath no particular knowledge of them, but yet that some writings of some kind, in which he is interested, and relative to the property he seeks to recover, do exist and are in the possession of the defendant, that in these cases, the allegation of the loss of the papers, or that they are in the possession of the defendant, need *not* be on oath. That until some decisions in *England*, within ten years past, it hath always been held, as it is expressed in the books, that "a *demurrer* being bad in *part*, must be overruled," for it is not like a plea "which may be allowed in *part;* but a demurrer void in *part* is void *in toto*, and cannot be separated," "that a

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general demurrer to the *whole* bill, if there is any part of the bill to which the defendant ought to put in an answer, the demurrer being *entire*, must be overruled," "that a demurrer if defective in *part*, is bad for the *whole*, for it cannot be *split*." That although the decisions of the *English* courts are deservedly of great authority, yet the reasons in these alluded to, "the supposed hardship on a defendant, if he cannot avoid the expense of taking a copy of a *long* bill, if there chances to be a right to a discovery," and thereby making "the only question to be, whether the plaintiff should be put to the expense of a bill, or the defendant of a new demurrer," are not convincing; for if

* 177 the defendant, instead of a *general* demurrer to *the whole bill will demur particularly to each separate or distinct part or matter, to which he may suppose "he ought not to put in an answer," the demurrer may be overruled as to some parts or matters, and allowed as to others; and the defendant, among other costs, may be decreed the expense of so much of the copy of the bill, to which the demurrer was allowed; so, that there will not, in that respect, be any hardship left on him. It may be also stated, that there are other means, and within the powers of the court, to correct the mischief, if it prevails, of filing bills, of an undue length, containing matters to which the defendant ought not to answer, preferably to merely *turning the plaintiff round*, and subjecting him to the delay and expense of a new bill. The conclusion, therefore, is, that there hath not appeared to us sufficient reason to change an established and approved practice; and, consequently, if there are any matters in the bill, to which the defendants ought to have put in an answer, the demurrer being *general*, and to the whole bill, must be overruled in the *whole*. This leads to an examination of the several causes of demurrer.

First cause of demurrer. The defendants object to the proof as arising from the affidavit of the complainant, *Boon;* 1st. That there is only the oath of *one*, whereas there ought to be an oath from *every* of the complainants; 2dly. That

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the oath ought not only to state the destruction of the supposed writings, but also that the deponents have them not in their own possession; and, 3dly. That the deponent doth not swear from his *own* knowledge, but from the information of *others*. Here I state that the proof of *the allegation of the loss of the writing is restricted to the oath of the party, in exclusion of the oath of a stranger; and, therefore, if the circumstances of the case are such, as that it is to be presumed the party cannot know the facts from his own knowledge, he must then, from necessity, be admitted to testify from the *credible* information, or in other words, from the hearsay of *others;* that, whenever the law admits hearsay testimony, the fact is then as competently thereby proved and established, as if the person giving testimony was to testify from his own knowledge; that, whenever a person swears from the credible information of others, it not only implies that he hath inquired to an extent, and in a manner, to produce a rational belief that the fact is as he testifies it to be, but it also excludes the supposition that he hath any reason even to *suspect* it to be otherwise; that a distinction is to be taken between the cases, where the writing is so lost, only, as that it cannot for the present be found, yet is supposed still to exist, and the cases where the writing is wholly destroyed, and, therefore, supposed *not* to exist; and that, although in some of the former cases, it may be proper, in order to guard against evasion, to require the party to swear also, that he hath not himself the writing in his possession, yet, that in the latter cases, it would be altogether a useless accumulation of proof; it would be to require proof of another proposition of fact, which follows as a necessary logical consequence from one already proved. Assuming it, therefore, and which, I think, cannot be questioned, that the present is one of the cases in which proof from the information, or hearsay of others, is to be received, then the fact of the destruction *of the supposed conveyances from the original patentees to Sir *William Johnson*, is duly and

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competently proved; and, consequently, the affidavit of the complainant, *Boon*, alone is sufficient, so that the first cause of demurrer fails.

Second cause of demurrer. It must be admitted, that there cannot be a more sound or salutary principle than the one on which this cause of demurrer proceeds; that a court of equity should always withhold its aid and countenance from a suitor, whose conduct appears in any part such as a conscience rightly informed, cannot approve: but the principle is not applicable to the present case. The supposed illegality of the agreement between the original patentees and Sir *William Johnson*, consists in its being in contravention of the instruction from the king to the governor, restraining the patents for lands to quantities not exceeding 1,000 acres to each patentee. The futility of this regulation was soon discerned, and the instruction was, for not much less, if any, than half a century before the patent mentioned in the bill issued, considered altogether as a dead letter, and the compliance with it a mere matter of form. But, even conceding that the legality of an agreement, similar to the one supposed to have taken place between the patentees and Sir *William Johnson*, might be made a question, yet that could only be the case where the agreement was *before* the *Indian* purchase; because, immediately on the purchase, the king, in whose name these purchases were always made, became trustee for the persons to whose use they were made, and the trust, possibly on *artificially legal* principles, might have been limited to a

* 180 *quantity not exceeding the rate of 1,000 acres to each person. The several *cestui que trusts*, however, had an equitable interest in their respective shares, which they could legally assign, and agree to vest the title at law in the assignees, on the issuing of the patent; and, as it doth not appear when the agreement in the present instance was made, in respect to whether *before or after* the *Indian* purchase, the illegality of it cannot come under consideration on the defendants' demurrer. It was a matter of which

they could avail themselves by plea only, with the requisite averments supplying the uncertainty of the bill, as to the *time* when the agreement was made.

Third cause of demurrer. The answer which has been given to this cause of demurrer is, that it was not requisite for the defendants, in answering the bill, to declare, either that there was an adverse possession, or if there was, then that the defendants *knew* it; but, that it would have been sufficient if they had simply admitted that their vendors were not, at the time of purchase by them, the defendants, in possession; because, whether the possession was vacant, or whether it was adversely held by others, and if the latter, whether the defendants knew it, which ever might have been the fact, was wholly immaterial. This answer, it must be owned, is far from being unsatisfactory; at the same time, the principle *that a man is not held to accuse himself*, is so estimable, that we cannot be too cautious in admitting distinctions or qualifications of it. Therefore, and especially as the discovery sought for in this instance, is of a fact altogether useless in the complainants' *case, I should have supposed it more safe, if a particular demurrer had been put in to that part of the bill, to have allowed it, and ordered the allegation and interrogatory which the demurrer supposes to be exceptionable, to be struck out of the bill.

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Three last causes of demurrer. I shall consider these causes together, for I am not persuaded they might not all have been shown under the last, the general cause of demurrer, they being essentially the same, amounting to a denial that the court ought to grant a relief, supposing all the allegations in the bill to be confessed, which is only saying in other words, *there is a want of equity*. I here remark, that it is ordinarily premature wholly to dismiss a bill on a demurrer for this general cause, and so, as it were, at the threshold, unless the complainant's case is, from his own showing, radically such that no discovery or proof can possibly make it a proper subject of equitable

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jurisdiction. Such was the late case of *Munro and others, appellants*, v. *Allaire, respondent*, decided in this court, where the complainant came to have a purchase of lands perfected and confirmed to him, the supposed sale being made by trustees under a will, and he being one, and not alleging himself also a *cestui que trust*, one of the legatees to whom the money arising from the sale was to be paid, and that he, although a trustee, was obliged to purchase, in order to avoid the loss to himself as a *cestui que trust*, by a sale at a less price: for it is to be remarked, that the defendant doth not forego or waive a single advantage as to the merits, or the point, whether the complainant hath equity by not demurring. He may equally insist on the

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same *matters, by way of answer, which he might have done by demurrer, and if he should even omit them in the answer, he may still avail himself of them in argument on the final hearing of the cause; my opinion, therefore, is, that the bill ought to have been retained, and that the court of chancery should have reserved itself on the question, whether the complainants were entitled to any, or what relief, until all the proofs, either as arising from the answers of the defendants, or otherwise, had come in; and, consequently, that the several decrees allowing the respective demurrers of the respondents, and dismissing the appellants' bill, be reversed. The respondents have not only put in separate demurrers, but they have also proceeded separately to decrees. How far, or by what means, a court of chancery ought to restrain and regulate the right of defendants to *sever* in their defence, so as to prevent them from availing themselves of it solely to vex the complainants, are matters in which I forbear from an opinion in my place in this court, because it is unnecessary: We can only declare and establish what shall be the consequences of an unnecessary severance, if there should afterwards be an appeal, and a judgment of reversal for the complainants. This may, in some measure, prevent the abuse alluded to. My opinion, therefore, further is, that *each respective* re-

spondent in the present appeal, be decreed to pay the appellants for their costs on the appeal, a sum to the same amount, which would have been decreed to be paid by them *all jointly*, if they had joined in demurrer in the court below.

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*DECREED.†

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† 14th *March*, 1798.

ON hearing counsel on this appeal, it is adjudged, ordered and decreed by this court, that the several decrees of the court of chancery therein complained of, allowing the separate demurrers of the respondents respectively, to the bill of complaint of the appellants, against the respondents, and the other defendants in the bill named, and that the said bill, as it respected each of the respondents, should be dismissed, be reversed; and further, that the respondents severally pay to the appellants, the sum of 30 dollars for their costs on this appeal, in respect to each respective decree so reversed, and that the cause be remitted back to the said court of chancery, and that there, such further proceedings shall be thereupon had, as well for execution of this judgment, order and decree, as otherwise, as shall be agreeable to equity and justice.

Peter Jay Munro, Benjamin Griffen, Isaac Sniffin, and Mary Palmer, the younger, Appellants, *against* Peter Allaire, Respondent.

PETER ALLAIRE, of *Marmaroneck*, in the county of *Westchester*, the respondent in this cause, filed his bill of complaint, some time in the year one thousand seven hundred and ninety-five, against the above named appellants, and therein stated, that *Benjamin Palmer*, late of

A purchase by an executor who has a power to sell for the benefit of a third person, from his *cestui que trust* is not favoured in equity, and a bill by him for a specific performance cannot be maintained, but it seems that a purchase by a trustee, who is also a *cestui que trust*, may, if to save the property from loss, be sustained.

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Marmaroneck aforesaid, being seised and possessed of certain *real* *and *personal* estate in the said bill mentioned, executed his last will and testament, in due form of law, and thereby directed his executors to sell and dispose of his estate, real and personal, *within one year after his decease*, to

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pay all his just debts, and funeral charges, and as to the remainder and residue of the moneys arising from the said sale, of his real and personal estate, he gave and bequeathed unto his *son*, *Thomas Palmer*, eighty pounds, to be put out at interest by his executors, until he attained the age of twenty-one years; that the interest thereof should be paid annually to his wife, and should his son die before he attained the age of twenty-one years, he gave the said sum of eighty pounds to his said wife, *Mary Palmer*, one of the appellants, and devised all the residue and remainder of his estate, both real and personal (that might come into the hands of his executors) unto her, her heirs, executors and assigns *for ever*, to do with as she should think meet; and appointed his said wife executrix, and the said *Benjamin Griffen*, and the said *Peter Allaire*, executors of the said will.

The bill further stated, that the said *Benjamin Palmer* died without altering or revoking his will; that the appellant *Benjamin Griffen* and the said *Peter Allaire*, proved the same; that the appellant, *Mary Palmer*, refused to prove the will; or intermeddle with the said estate, as she was not able to read or write; that soon after this, the appellant, *Isaac Sniffin*, wanted to purchase her right in the said estate, and offered for it four hundred and fifty pounds; that the appellant, *Benjamin Griffen*, advised the taking of that sum; that the

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said *Mary Palmer* *was willing to take that price, if no more could be obtained; that the said *Peter Allaire* was desirous of purchasing; that a long treaty for that purpose took place, in which Judge *Tompkins* was consulted as the *friend* of the said *Mary Palmer;* the proceedings on which consultation the said *Peter Allaire* stated by his bill, were fairly conducted on his part; that articles for the said pur-

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chase, at the price of six hundred pounds, were executed by the said *Peter Allaire*, and the said *Mary Palmer*, and afterwards, the following conveyance was made to him, by her, of all her right, title and interest in the estate of her said husband; she promising to give a better conveyance, if that should be found defective.

The indenture set forth, that *Mary Palmer*, for and in consideration of six hundred pounds, remised, released, and for ever quitclaimed, and by these presents, made on this occasion, "did remise, release, and for ever quitclaim, unto the said *Peter Allaire*, and to his heirs and assigns, all her right, title, interest, claim, dower, or title of dower whatsoever, which she the said *Mary Palmer* now has, may, might, should, or of right ought to have, or claim of, in, or out of all and every, the messuage, lands, tenements, and hereditaments, goods and chattels, which were belonging to the said *Benjamin Palmer*, the younger, her late husband, which were devised to him, by the last will and testament of *Benjamin Palmer*, the elder, and *Mary Palmer*, deceased, excepting the sum of eighty pounds," before mentioned, left as aforesaid, to *Thomas Palmer*, with remainder to *Mary*, his mother, "and all manner of action and actions, writ or *writs of dower, whatsoever, so as neither she the said *Mary Palmer*, nor any other person for her, or in her name, any manner of dower, or writ of action of dower, or any right or title of dower, of, or in the said messuage, lands, tenements and hereditaments, or of, or in any part or parcel thereof, (except as before excepted,) at any time hereafter, shall, or may have claim, or prosecute against the said *Peter Allaire*, his heirs or assigns. * 186

The said bill further stated, that he, *Peter Allaire*, had executed a bond and mortgage to the said *Mary Palmer*, conditioned for the payment of three hundred and twenty pounds, part of the said purchase-money; that the testator's debts were estimated at two hundred pounds, to discharge which, and pay *Mary Palmer* the overplus, (if any,)

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and also for the securing the said sum of eighty pounds, and the interest thereof, he the said *Peter Allaire* delivered another obligation to the said *Mary;* that she gave him a bond to refund, if the debts should prove greater than what they were estimated at, and together with the appellant, the said *Benjamin Griffen*, promised to execute a deed in trust for him, of the testator's property.

That he the said *Peter Allaire* had advertised for the creditors of the testator to bring in their accounts to him, and had paid several, particularly to the appellant *Benjamin Griffen*, several accounts, which had been before paid by the said *Benjamin Griffen*, and that the price of six hundred pounds was the full value of the said real and personal estate.

* 187 *The bill further stated, in substance, that the appellants, *Isaac Sniffin* and *Peter Jay Munro*, having notice of the premises, had procured a subsequent conveyance for the said real and personal estate from the said *Benjamin Griffen* and *Mary Palmer*, who qualified herself as an executrix for that purpose. That the appellants, *Peter Jay Munro* and *Isaac Sniffin*, or one of them, indemnified her for such conveyance. That the said *Peter Jay Munro* had possessed himself of a great part of the real and personal estate of the testator, and refused to account for the personal estate to the said *Peter Allaire*, or to let him into the possession of the real estate. The bill, therefore, prayed, that the said *Peter Jay Munro* might account for such part of the personal estate of the said *Benjamin Palmer* as had come to his hands; for a specific performance of the agreement made between the said *Peter Allaire* and *Mary Palmer;* to receive a more perfect assurance and conveyance of the estate of the said *Benjamin Palmer*, deceased, and to receive to such other and further relief as the nature of his case might require.

To this bill the appellants, *Isaac Sniffin* and *Mary Palmer*, filed their general demurrer for want of equity as against them. The appellant, *Benjamin Griffen*, also demurred for the same reason, to so much as respected the

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real estate of the testator, or demanded any relief against him relating thereto; answering, nevertheless, that he never had agreed to convey the said real estate to the said *Peter Allaire;* and that the said *Peter Allaire* never paid any of the testator's debts, except some trifles, amounting to about 2*l.* 6*s.* which were discharged with *money received by the said *Peter Allaire*, from the sale of a part of the personal estate of the testator. The appellant, *Peter Jay Munro*, also demurred for the same cause, to so much of the said bill as respected the said real estate; but answered, that he had never possessed himself of any part of the personal estate of the testator, nor taken any conveyance or assignment of the same.

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Upon these several demurrers the cause came on to be argued in the said court of chancery, when his honour the Chancellor was pleased to direct and order, that the demurrers should be overruled, and that the appellants should answer fully to the said bill; from which orders and directions the appellants severally appealed.

1st. Because the said *Peter Allaire* as a trustee and executor, could not be a purchaser under the testator's will, of the said real or personal estate, nor was the said *Mary Palmer*, at the time of making the said pretended sale, in capacity to do any act which could affect the real estate of the said testator.

2d. Because the other executors named in the said will, could never give a valid conveyance for the same to the said *Peter Allaire.*

3d. Because the testator's creditors did not appear to have been satisfied, nor his son's annuity paid; but on the contrary, according to the said *Peter Allaire's* own showing, neither the one nor the other had been done; neither had any of the said creditors, nor had the said legatee consented to the said pretended sale to the said *Peter Allaire*, to or look to him, alone, for their demands.

4th. Because the *heir* of the said testator was not a party of the said bill.

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*5th. Because, as to the testator's personal estate, there was no charge that the same had come to the hands of the said *Benjamin Griffen*, *Mary Palmer*, or *Isaac Sniffin*, nor was any account thereof requested from any of them. And the said *Peter Jay Munro* had, by answer, fully cleared himself of any concern with the same, even if the said *Peter Allaire* had a right to command an account of it.

6th. Because, as the said *Benjamin Griffen* denied any promise to the said *Peter Allaire* for that purpose, he could not be bound to execute a conveyance to him.

7th. Because, as the bill was framed, the scope thereof against all the defendants therein, was a specific performance and confirmation of the said *Peter Allaire's* title, which the appellants could not give, and he had no right to demand. And the general prayer of relief at the conclusion of the bill, could not operate so as to depart from the general purview of the statement of his case.

The respondent referred himself to the case made by the appellants, and the pleadings filed in the court of chancery, and humbly insisted, that the orders and directions appealed from should be affirmed for the following reasons:

1st. Because the said *Benjamin Palmer* having, by his said will, given only a naked authority to his executors to sell his real and personal estates, in order to pay all his just debts and funeral expenses, and a legacy to his son *Thomas Palmer*, and having bequeathed the residue of his estate to the said *Mary Palmer*, there was no necessity for the executors to *sell the real estate at all; provided, the said debts and legacy were paid.

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2d. Because *Mary Palmer*, being the residuary devisee and legatee, could sell her interest under the will, to the said *Peter Allaire*, or to any other person.

3d. Because the said *Peter Allaire* would not be considered as a trustee for the said *Mary Palmer*, until a sale by him, and the executors of the said real estate, and even then, he might take from her a release of her interest to the property which had or might come to his hands.

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4th. Because it is not necessary that the other executors in the will should join in the conveyance with the said *Mary Palmer* to the said *Peter Allaire*, the bill only praying a specific performance of her agreement with the said *Peter Allaire*.

5th. Because the said *Mary Palmer* was guilty of a fraud, in selling her interest in the estate, to *Isaac Sniffin*, perhaps, too, for a smaller sum, after she had already agreed to sell it to the said *Peter Allaire*, who had paid her for the same.

6th. Because it appears that the said *Peter Allaire* had retained in his hands moneys sufficient to pay the creditors and the legacy of the testator's son; and the decree below might have been so framed, if necessary, as to compel him to satisfy those demands before the said *Mary Palmer* had perfected her title.

7th. Because the consent of the creditors and the testator's son was not necessary to the sale of *Mary Palmer's* interest in the estate, inasmuch as they could not be injured by it, the said debts and legacy *remaining a charge upon the land, notwithstanding such alienation by the said *Mary Palmer*. * 191

8th. Because the whole residuary estate being given to the said *Mary Palmer*, it was unnecessary to make the heir at law a party. If the bill was defective in that respect, it might be cause for a special, not a general demurrer; besides, the Chancellor could, in any subsequent stage of the cause, have ordered the heir at law, if he had judged it necessary, to be brought before the court.

9th. Because, there being a general prayer for relief, any remedy suited to the respondent's case might have been afforded. For instance, the court might have ordered the bond and mortgage given by *Allaire* to *Mary Palmer* to be delivered up to be cancelled, or it might have ordered the said *Peter Jay Munro* to join the said *Mary* in perfecting the respondent's title, or it might have ordered the deeds to the said *Isaac Sniffin* and *Peter Jay Munro*, to be

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cancelled, and awarded, if necessary, a perpetual injunction to the *executors* against selling.

10th. Because, if the said bill does not charge the said *Benjamin Griffen*, *Mary Palmer*, or *Isaac Sniffin*, with receiving any of the testator's personal estate, such allegation was unnecessary, or if the bill be defective here, it was sufficiently complete in other respects, not to be dismissed on a general demurrer.

Benson, J. This is an appeal from the orders of the court of chancery, overruling the several demurrers of the appellants to the respondent's bill.

* 192 The intent of the respondent's bill in the court of chancery is, that he may have a specific performance of *his agreement with the appellant, *Mary Palmer*, whereby she bound herself to convey to him, by good and sufficient conveyances in the law, all her estate, right, title and interest whatever, to the estate of her late husband, and that he may receive a more perfect assurance and conveyance of the said estate.

To that end, the other appellants are also brought into court, either as confederates with her, or as subsequent purchasers from her with notice. Several questions have been raised and argued by the counsel on both sides. An opinion by the court on each of these questions would be unnecessary. It is, therefore, to be foreborne, it being sufficient for a decision against the respondent, that he had, at any time, as a trustee, a power over the property so agreed to be conveyed, and whether this property existed in the shape, either of money or of land, makes no difference. The demurrers by the appellants, therefore, were well taken, it being a principle *that a trustee can never be a purchaser;* and, I assume it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might them-

selves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard, that the trustee should be the only person of all mankind who may not purchase; yet, for the very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed. *Therefore, far from * 193
discerning the respondent's case as an exception, supposing the rule to be only general and not universal, I would remark, that notwithstanding the averment in the bill, that *Mary Palmer* fully understood the agreement and conveyance, and, independent of the circumstance that she was not able to read or write, whoever will merely look at the conveyance, which is set forth at large in the bill, will instantly perceive that the parties, or other persons who are named in the bill, as friends or agents in the transaction, did not know what she had by the agreement, agreed to convey; whether an estate in the land, or her eventual interest in the money to arise by the sale of the land; or in what manner, or to what extent these acts were susceptible of effect, or even whether they were not altogether nugatory. The conduct of the parties, and every other person having any other agency in a bargain so made, without due knowledge or advertisement, is, to say the least of it, indiscreet, irregular, unfit, and certainly to be discountenanced. I am, therefore, satisfied of the justness of this principle, that a court of equity ought never to *aid* a party to have the bargain enforced or perfected, with intent that any profit or advantage should be taken by it; the interposition of the court, if any, should be only to *avoid* or relieve against a loss or damage.

The principle, as quoted from the adjudications, is in terms without qualification or exception. A trustee can *never* be a purchaser, &c. and without some explanation, I may, possibly, be considered as understanding it in its apparently absolute sense. I will, therefore, briefly mention that the cases where the suit is *against* the trustee to set aside a purchase, *he having procured the requisite formal * 194

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legal title, are to be distinguished from those where the suit is by him to effectuate a purchase, either by having the thing purchased, decreed to him specifically, or by having the *means* decreed to him, whereby he may *recover at law*. That in the latter case, it appears to me, that the rule is to apply as unlimitedly as it is expressed; but that in the former case, a court of equity will not always interfere as of course; for, if the *cestui que trusts* will agree to allow the purchase, it may be allowed without fear from the precedent; and that it is not, in every instance, indispensable that all the *cestui que trusts* should agree to waive the implied fraud; it may be sufficient for a majority, or such other number or proportion of them to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact. It only remains to be noticed, that if the agreement and conveyance are to be without effect, *Mary Palmer* ought not to retain the bond and mortgage against the respondent. She is, nevertheless, entitled to hold them until he shall make her an offer to relinquish the agreement, and to deliver up the conveyance he now holds against her to be cancelled. It is not possible for the respondent to *allege* an offer to that purpose, and to conform the prayer of his bill and his petition to it, in consequence of any answer which the appellants could be compelled to make to the bill, and it is a rule that every decree must be according to the form of the petition; so that if the respondent is to be relieved against the bond and mortgage, he must proceed *de novo*, and as he shall be advised.

My opinion is, that the order appealed from be reversed.

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† 20th *March*, 1796.

*DECREE. Whereupon,† the court thereupon do order, adjudge and decree, that the orders therein complained of be reversed, and that the demurrers of the appellants to the respondent's bill stand allowed. That the respondent pay to the appellants their costs in respect to the said ap-

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peal; that the respondent's bill, as to the appellants, *Isaac Sniffin* and *Mary Palmer*, the younger, be dismissed with costs; that the respondent pay to the appellants, *Peter Jay Munro* and *Benjamin Griffen*, their costs in respect of their demurrers; and that the court of chancery give all necessary directions for carrying this judgment into execution.

And it is further ordered, that in respect of such matter in the respondent's bill, to which the appellants, *Peter Jay Munro* and *Benjamin Griffen*, have answered, the cause be remitted to the court of chancery, there to be proceeded in as between the respondent and the said *Peter Jay Munro* and *Benjamin Griffen*, as shall be just.

Judgment of reversal.

(Supreme Court, 1796.)

Lewis *against* Burr.

THIS was an action of *assumpsit*, determined by the supreme court.

The 4th of *July* is a public holiday, a note or bill, therefore, falling due on that day, is payable on the third of the month.

The suit was by the plaintiff as endorsee, against the defendant as endorsor of a promissory note, made by *Roger Enos* to him, dated the first of *June*, one thousand seven hundred and ninety-five, for three thousand five hundred dollars, payable thirty days after date. *Plea*, the *general issue*.

*The special verdict finding the note and the endorsement of it by the defendant to the plaintiff, and then the following facts, was as follows: "that on the third day of *July*, in the year aforesaid, the said three thousand five hundred dollars, in the said note mentioned, or any part thereof, being no ways paid, the said *Francis Lewis*, by his agent, *Solomon M. Cohen*, made diligent inquiry and search for the said *Roger Enos*, in the said city and county of

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New-York, and especially at his usual place of abode in the said city, to the intent to request him to pay to the said *Francis Lewis*, the said three thousand five hundred dollars, in the said note contained, according to the tenor of the same, but the said *Roger Enos* was not then to be found, being absent from the said city and county, in parts to the jurors unknown; that the said *Roger Enos* continued absent from the said city and county thenceforth, until after the fourth day of *July*, in the year aforesaid; that the said *Francis Lewis*, not finding the said *Roger Enos*, to make the said request, did, on the said third day of *July*, in the year aforesaid, by his agent aforesaid, deliver to the said *Aaron Burr*, a paper writing, subscribed with the proper hand-writing of his said agent, in the words and figures following, to wit:

"*New-York*, 3*d July*, 1795.

"SIR—As General *Enos* is not in town, and his note with your endorsement for 3,500 dollars, is payable to-morrow, the 4th instant, the holder desired me to give you this notice, that he looks to you for payment of the same; and I undertake this to prevent a protest; General *Enos* is expected daily, when he will have cash sufficient to
* 197 discharge the same, as I *am credibly informed; I hope my conduct in this business will meet with your approbation; which will be very pleasing to

Sir,

Your most obedient servant,

SOLOMON MYERS COHEN."

"And the jurors aforesaid upon their oath aforesaid, further say, that the 4th day of *July* in each year, is the anniversary day of the declaration of the independence of these *United States of America*, and for that reason is in practice, though not by law, generally observed by the citizens of this state of *New-York*, as a public festival; and, also, that some time in the month of *May*, in the year of our lord 1784, upon the institution of the bank of *New-York*, which does no business on any fourth day of *July*,

it became, and since continually has been, and still is, a general practice and usage in the said city of *New-York*, for the holder of a promissory note made by one person and endorsed by another, if the same become payable, allowing three days of grace, on the 4th day of *July*, in any year, to demand payment from the maker of such note, of the sum therein mentioned, on the 3d day of the same *July*, and if he refuse to pay the same, or if he cannot be found, to the end that payment may be demanded of him, and if the said holder shall be minded to look to the said endorsor for payment of the said note; then, forthwith, that is to say, on the same 3d day of *July*, to give notice to the said endorsor, of such refusal to pay the sum mentioned, in the said note, or that the maker thereof cannot be found, to the end that payment may be demanded of him, and also, that it is the intention of the said holder to look to the said endorsor *for the payment of the said sum. But whether," &c.

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Per Curiam, by BENSON, J. By our statute of the 27th *March*, 1794, "promissory notes are made assignable and endorsable over; and an action may be maintained on them, as in cases of inland bills of exchange."

The reference to bills of exchange is contained in the *English* statute, of the 3d and 4th *Anne;* but having been omitted in the colonial statute of 1773, it was also omitted in the statute of 1788, in our revised code; the omission, therefore, in the statute of 1788, can be accounted for. But whether it was in the first instance designed or accidental in the statute of 1773, cannot be ascertained. It, however, occasioned the statute of 1794, which, it is known, was intended, and has been received and practised on in the community, as a provision, in addition or amendment of the statute of 1788, to give days of grace to promissory notes; hence it is, that they are now considered as entitled to this incident, by law. The *law*, however, does not *create* the incident; it existed before, as appertaining to

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bills of exchange, and the law can only be adjudged as *constructively extending* it to promissory notes: it however existed by force of custom only; to know, therefore, what the incident is, we still resort to custom.

Days of grace, as a general incident to bills of exchange, are by almost universal custom; the number of days being different in different places, according to their respective laws and customs. In *England* the number is three, and wholly by custom.

There, also, if the last of the three days happens to be a day on which either the law or custom hath *established "that no money is to be paid," then the number is to be restricted to two. This is also not only wholly by custom, but is repugnant to the analogy of a rule of municipal law, by which, if an act is to be done on a day, which happens to be a *Sunday*, or any other day on which it could not be done, without transgressing the law, that then, instead of the day *before*, it must be done on the day after; so that the regulation of restricting the period of respite in favour of the creditor, preferably to enlarging it in favour of the debtor, if it had been questioned in its commencement, I should conceive, ought to have been arrested by the courts of justice, not as inconvenient or injurious in itself, but as repugnant to the rule of law in analogous cases; it having, however, been sanctioned by custom, it was, therefore, judicially "approved;" *consuetudo altera lex.*

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I assume it, that the custom, as it existed in *England* at the time of our revolution, was deemed, in fact, to be the custom among us, and entitled to prevail. In addition to the custom, as it then existed, the special verdict finds a continued custom from the month of *May*, 1784, hitherto for another day besides *Sunday*, &c. when the restriction of the number of days of grace is to take place, namely, the anniversary of our independence. The question, therefore, between the parties is, whether the custom is not, in this particular, also equally entitled to prevail? with re-

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spect to which, I would briefly state that, whenever a practice, usage or custom hath obtained, for a length of time, so as that it may be presumed to be generally known; that then, all contracts to which it may be applicable, shall be interpreted *and governed by it. This principle is not new: we practise on it daily. Where the contract is not special or explicit, so as to exclude construction, the inquiry always is, what is usual? Lest I may be misunderstood, I would mention, that I mean such practices, usages, or customs only, as may consist with law; that I decide only on their force or authority, admitting the object of them to be lawful.

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I am of opinion, that the note in question is to be adjudged as having fallen due on the 3d day of *July*, the *second* day of grace, and, consequently, that the plaintiff is entitled to recover.

(SUPREME COURT.)

Cortelyou *against* Lansing, Administrator of Antill.

On the deposit of a pledge, where no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor; if the pawnee sell the pledge before application to redeem, he is answerable for the value of the pledge at the time of the application, and it is not necessary in such case to make an actual tender of the balance due.

THIS was an action of *assumpsit*, under the following circumstances. On the 29th of *April*, 1786, *Antill* deposited with the defendant a depreciation note, taking from him a receipt in these words; "Received of *E. Antill*, as a deposit, to remain in my hands, his depreciation note, dated 1st *January*, 1781, No. 26. said to be for the value of 2,629 dollars and 48 cents, which note is to be delivered up upon the payment of 600 dollars, with lawful interest, lent and advanced by me to the said *E. A.* on the 24th of *September*, 1783, or upon giving such other security as will be acceptable for the whole, or such part as may be found due upon a future settlement.

On the 1st of *January*, 1785, the defendant received on account of the 600 dollars, 125 dollars, and on the 9th

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October, 1788, he sold the certificate for 625 dollars being the highest market price that could *be obtained for the same, leaving a balance of 39 dollars and 62 cents due to him on that day.

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In 1791 or 1792 *Antill* died, and administration being granted to the plaintiff, he, in 1799, went to the house of the defendant for the purpose of demanding the certificate, but in consequence of the defendant's incapacity to attend to business from mental derangement, he could not be seen. There was no evidence that the plaintiff had any money at the time to tender to the defendant.

At the trial, the court charged the jury on this evidence, that the demand of damages was a question of law, but that the plaintiff was entitled to recover; and that the only rule of damage was the value of the certificate in 1799, together with interest from that time. The jury found accordingly, subject to the opinion of the court on the above case.

Per Curiam, delivered by KENT, J. The points relied on by the defendant are,

1. That he had a right to dispose of the certificate.

2. That the pledge had become absolute by the death of the pawnor.

3. That a tender of the money was requisite before suit.

4. That the rule of damages was subject to the discretion of the jury.

The two first questions raised in this case, respect the rights of the parties over the depreciation note thus deposited with the defendant; the one claiming a right to redeem, and the other to sell it; each reciprocally denying the other's pretensions. But the *books involve the inquirer in considerable doubt and difficulty in the discussion of these questions, nor do the *English* courts appear to have defined and settled them with their usual accuracy and precision.

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The note in question came under the strict definition of a pledge.† It was delivered to the defendant with a right to detain as a security for his debt, but the legal property did not pass, as it does in the case of a mortgage, with a condition of a defeasance. The general ownership remained with the intestate, and only a special property passed to the defendant. It is, therefore, to be distinguished from a mortgage of goods, for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge; but a mortgage of goods is, in certain cases, valid without delivery.

†*Dig. lib.* 13. tit. 7. § 9. 1 *Hub.* 291. § 15. *Brooke's Abr.* tit *Pledges*, 20. 2 *Vezey*, jun. 378. 1 *Powell on Mort.* p. 3. *Bracton*, 99. *b.*

The mortgage and the pledge, or pawn of goods seem, however, generally to have been confounded in the books, and it was not until lately that this just discrimination has been well attended to and explained.

I find no difficulty in saying that the defendant had no authority to sell the pledge at the time he sold it. It was, at that time, an illegal conversion of the intestate's property. The pledge was delivered without any specified time of payment or redemption. It was to remain in the defendant's hands to be delivered upon payment. The cases relied on by the defendant's counsel admit that, in such a case, the pawnor has his whole life-time to redeem. If this be so, the defendant had no right to sell during the pawnor's life; because the one right would be inconsistent with the other. The expression, however, *that the pawnor has his life as a time to redeem, where no time of redemption is fixed, must be taken with this qualification, that the defendant does not, in the mean time, call upon him to redeem.

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This he certainly must have a right to do. The manner in which that call is to be made, and, in case of the pawnor's default, the manner of disposal of the pledge, are distinct points which I need not now discuss; because, in the present case, no call whatever was made upon the intestate, previous to the sale of the note. There is no instance to be found, in case of a deposit for an indefinite time,

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where the pawnee sold in the life-time of the pawnor, and without making a previous demand, that such sale was held good. The sale by the defendant was, therefore, clearly unauthorized and illegal.

The next, and the more difficult question is, whether the representatives of the pawnor have a right to call upon the defendant to restore the pledge or its equivalent. That the intestate had such a right is not to be disputed, and the point is, whether it be such a right of action as died with the person, or whether, as in all other cases of a right of action, not founded on a personal tort, it descended to the plaintiff. If the right of action did not descend, this will be the first case, I apprehend, that ever existed, in which the remedy for the conversion of one's property was limited to the life-time of the party injured. But it is said to be immaterial, what was the defendant's conduct in respect to the pledge, since where no time was fixed, the pawnor must redeem in his life-time, and if he dies without redeeming, the property in the pledge becomes absolute in the

* 204 *pawnee. This last proposition has so much countenance in the books, that to determine on its validity it will be necessary to bestow a considerable attention to the cases, and if I am not greatly mistaken, the result will show that it is wholly destitute of any solid foundation.

Glanville, the earliest of our juridical classics, has treated the subject with a precision not to be found in the authorities of a subsequent period, and with a perspicuity and simplicity that bespeak a writer of a primitive age. A loan,† he observes, is sometimes made on the security of a pledge, (*sub vadii positione*,) and the pledge may consist of chattels, lands or rents.‡ Sometimes possession is immediately given of the pledge, on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that in case the debtor should

† *Glanville, lib.* 10. c. 1. p. 59.

‡ 1 *Reeves*, 161.

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not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property, the agreement must be observed. But if there be no such agreement, and there be a fixed time of redemption, and the debtor make *delay* in payment, the creditor may quicken the redemption by a writ, (of which he gives the form,) and which requires the debtor without delay to redeem (*acquietet rem quam invadiavit*) the pledge.

On the return of the writ, if the defendant confessed the pledge,† he was commanded to redeem in a reasonable time, and on default, the *creditor had license to treat the pledge as his own. But if the pledge was made without mention of any particular term,‡ the creditor might (*debitum petere*) demand his debt at any time and the debt being discharged, the creditor was bound to restore the pledge without any deterioration.

† 1 *Reeves*, 162.

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‡ *Ib.* 163.

This authority establishes two points.

1st. That if the pledge was not redeemed by the time stipulated, it did not then become absolute property, in the hands of the pawnee, but the pawnee was obliged to have recourse to the *aula regis*, and to sue out an original writ, in order to obtain authority to dispose of the pledge.

2d. That if the pledge was for an indefinite term, the creditor might, at any time, call upon the debtor to redeem by the same process of demand. By what authority the judges in the time of *James* I. advanced a different doctrine on this subject, is not made to appear. The rights of the parties arising out of the case of a pawn, underwent, however, a considerable discussion in three several cases during that reign.

In the case of *Mores* v. *Conhem*,† 7 *Jac.* I. in C. B. it was resolved by the court, that a pawnee had a *special property* in the goods pawned, and might use the pawn, so that it was not to its detriment, and if he *assigned* over the pawn, the assignee would be subject to detinue, if he detained the pawn after payment by the owner.

† *Owen, p.* 123.

This decision was correct, and in harmony with the an-

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cient laws, as laid down by *Glanville and Bracton*.† It considered a pawn in its true light, as a mere deposit of a chattel to be detained as a security, *and that the general property was still in the pawnee.

The next case is that of *Sir John Ratcliffe* v. *Davis*, 8 *Jac.* I. in K. B. That was a suit in trover, and the special verdict stated, that the plaintiff had pawned a hat-band, set with jewels, unto one *Whitlock*, a *goldsmith*, for 25*l.* no day was set to redeem. The pawnee on his death-bed, delivered the pledge to the defendant, with a request to keep it till the money was paid, and then to deliver it to the plaintiff. The pawnee then died, and the plaintiff tendered the debt to his executor, who refused to receive the money, and then he applied to the defendant and after a demand and refusal, brought his suit. The court gave judgment for the plaintiff; and of course decided all the points arising out of the verdict, which were, that the tender to the executor was well made; that by the tender and refusal, the special property in the pledge revested in the plaintiff; that the general property had been constantly in him; that the death of the pawnee did not destroy the right of redemption; that refusal by the defendant after tender to the executor, was a conversion, and that the defendant had only the bare custody of the pawn.

† *Glanville, ut supra, Bracton*, 99. *b.*

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This decision was in every respect reconcilable with the ancient law. It maintained without diminution, all the well known and settled rights of the respective parties; and had not the erudition of the judges (according to the taste of those times) carried them far beyond the record before them, and led them to discuss points, not relevant to the issue, we should, probably, never have heard of the present question.

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*But in giving their opinions, one of the judges said, that executors might redeem a pledge, and that it would be assets in their hands. The other four observed, that if time be limited to redeem, the death of either party previous to that time, could not prejudice the right; but if no

time was limited, the pawnor had his whole life, and if he died before he redeemed, the right was gone, and his executors could not redeem. It were to be wished that the reasons of the judges had been more fully reported than we find them in this case.

In the case as reported in *Bulstrode*, the only reason stated is, that it would be very mischievous to compel the pawnee to keep the goods thus pawned, for such an indefinite time, when he hath paid sufficiently for them. But this objection would have been found to have had no validity, if they had only attended to the law as laid down by *Glanville*, who says, as I have already stated, that where no time is fixed, the creditor might quicken his debtor's delay, and demand his debt at any time, the process for which he has given. From the case as reported in *Croke*, it is very questionable whether the court ever agreed in these extrajudicial *dicta*. He states that two of the judges held, that redemption could not be made after the death of the pawnor; for he, at his peril, ought to redeem in his time, as it is upon a mortgage; but that the others (and who were the majority) held otherwise, for that pledging doth not make an absolute property as in the case of a mortgage of land; but it is a delivery only until he pays, &c. So it is a debt to the one and a retainer of the thing to the other, for which there may be a redemand *at any time upon the payment of the money, as the pawnee hath but a special property in the goods to detain them for his security. * 208

In *Yelverton* and *Noy*, the opinion of the court is, however, given as it is in *Bulstrode*, and the reason stated is, that the pledge is a condition personal, and extends only to the person of him who pawned it. Supposing, then, this to be the more correct report of the case, the ground of the opinion is equally unsound; a pledge is not a property created upon a condition of defeasance like a mortgage. It has no analogy to the case of a *right* which is absolute to vest, or to be defeated on the *happening of an*

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event, nor is it susceptible of that strict construction, unless it be so modified by the express agreement of the parties. Least of all is it a condition personal to be performed exclusively by the pawnor. There is nothing of this in the nature of the contract, and in most cases, as when the time of payment is mentioned, it is agreed, that the right may remain perfect in the representatives of the parties.

† 2 *Co.* 79. the Lord *Cromwell's* case. *Dy.* 139. *a.*

In feoffments of land, upon condition that the feoffee do an act, and no time be limited, there he hath only his life-time; but if his *heirs* be mentioned, the condition is not broken by his death; but extendeth to his heirs indefinitely without limitation of time, and cannot be broken except upon request made by the feoffor or his heirs.

If the naming of the heirs would, in this case, do away the limitation of this condition to the person of the feoffor, even according to the rigid construction that used to pre-
* 209 vail, under the genius of the feudal *law over feoffments upon condition, surely it cannot be material that in personal contracts the executor should be named, for it is a general and well established principle, that they are affected equally as if named.

This notion of a pledge, resting upon the performance of a condition, to revest the right as in the case of a mortgage, probably led to the decision in *Capper* v. *Dickinson*,
‡ 1 *Roll. Rep.* 315. K. B. 13 *Jac.* I.‡ That if goods pawned for a time limited, be not redeemed at the day, they are forfeited and may be sold at the will of the pawnee.

This doctrine is also held by Justice *Dodderidge*, in his *Office of Executors*. He says the pawnee may dispose of it
§ Vol. 1. 76. 81. at his pleasure.§ This last decision not having any direct application to the present case, may be passed over without much notice. It is contrary to the contract of pledge, which does not pass any absolute interest, nor rest on any absolute condition. It is, as we have seen, repugnant to the ancient law, and it is contradicted by a late authority.

Comyns,† who is of himself a great authority, says, that if a man pledge goods for money lent, he may redeem, though he does not come at the day; and the practice has since become familiar.

By the *lex commissoria*‡ at *Rome*, it was lawful for the creditor and debtor to agree, that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of *Constantine*, contained in the *Code*, abolished this as oppressive, and with marks of indignation, declared that the memory of the former law ought to be abolished to all posterity. Such a rigorous decision as that in *Rolle*, is contrary to the law of *France*, of *Holland*, of *Scotland*, and, probably, of all other countries which have felt and obeyed the influence of the civil law; and if it were really a part of the *English* code, in this instance also, we might say of these people, that they were truly "*toto divisos orbe*" by their laws, as well as by their situation. *219

† *Dig* tit. *Mortgage by Pledge of Goods, b.*

‡ *Code, lib.* 8. tit. 35. *ch.* 3. 3 *Hub.* 1038. *sec.* 17. 1 *Domat.* 362. *sec.* 11.

There remains only an extrajudicial *dictum* of Ch. J. *Treby*,‡ and another of Lord *Harwicke*,§ and both supported only by the case in *Bulstrode*, which go to show that a pawn is not redeemable after the death of the pawnor, and these are all the authorities, as far as I have been able to discover, on which the whole proposition has rested.

‡ 1 Ld. *Raymond*, 434.

§ 1 *Vez.* 278.

In the chancery cases of *Tucker, Administrator*, &c. v. *Wilson*, in 1714, and *Lockwood* v. *Ewer*, in 1742, and *Kemp* v. *Westbrook*, in 1749, it was said, that a pawnee of stock was not bound to bring a bill of foreclosure, and might sell without it. But in the two first cases, the stock had been, in the first instance, *absolutely transferred* to the mortgagee with a defeasance thereto, that the assignment should be void, or the stock retransferred on payment at the day. They were cases, therefore, not of a pledge, but of a mortgage of goods, and although it is no where stated in what manner the mortgagee is to sell, yet, in the first of these cases, there was a previous notice to the opposite party, according to the rule of the civil law, and the giving of this notice was asserted to be the constant prac-

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tice. The last case was strictly a pledge of chattels to secure a loan, without a specified time of payment; and the assignee of the pawnor who had become a bankrupt, was allowed to redeem. This case has, therefore, *no further connexion with the present question, than to show that where no time is fixed, an assignee is competent to redeem.

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† *Prec. in Chan.* 420. 2 *Vern.* 691. 698. 1 *Eq. Ca. Abr.* 324. *Gilb. Eq. Rep.* 104. 3 *Bro.* 21.

The two cases of *Demandray* v. *Metcalf*,† in 1715, and of *Vendezee* v. *Willis*, in 1789, are cases of pledge, and perfectly in point in favour of the plaintiff. In the one case, there was a pawn of jewels, and in the other of bonds and securities. In both cases, the time of payment had elapsed in the life of the pawnor; he died, and the executors, on a bill to redeem on payment of the debt and interest, obtained a decree accordingly. It is said, indeed, in the first case, that the executors could not have back the jewels, without the assistance of chancery.

If by this was meant the identical chattel pawned, it was perhaps correct; but if the observation meant that the executors had no remedy but in equity, it must be a mistake; for a court of law has complete jurisdiction over the subject, and is equally competent to grant relief where the right of property is not extinguished. It would be unreasonable to turn the plaintiff round to another forum, when there are no technical difficulties to impede, nor any defect of authority to give him redress *here*, by restoring to him, if not the specific thing, yet its equivalent. If a court of law will permit the one party to demand his debt after the time, it will equally permit the other party to tender and redeem.‡ In the case of the *South Sea Company* v. *Duncomb*, K. B. *5 Geo.* II. it was decided, that where the pawnor of stock did not pay at the day stipulated, the pawnee had his election to sue for the debt, or *to stand to his remedy* *against the pawn. The court did not state the remedy, but still there was to be a remedy under the sanction of law, and the only remedies hitherto suggested in the books, are the process by writ, as stated in *Glanville*;

‡ *Str.* 919.

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the bill of foreclosure, as hinted in other cases; and the sale by the pawnee, after notice in cases of the transfer of stock, as seems to have been the practice.

From this review of the cases, I conclude, that whatever right to redeem existed in the pawnor at his death, that right descended entire and unimpaired to his representative. There are two decisions fully to this effect, and there is not a decision to the contrary, or one which establishes, that if no time be limited to redeem a pawn, the right to redeem is extinguished by the pawnor's death.

The several *dicta* in the courts which go thus far, are founded on principles manifestly erroneous. They departed from the true nature of a pawn, which was well understood in the *Roman* law, and well understood in the days of *Glanville* and *Bracton*, who were, no doubt, greatly instructed by that inestimable system of civil jurisprudence, although, with respect to *Glanville* in particular, he wrote the *English* law of his time, without much, if any, adoption from the *Roman*. The error consisted in applying to pawns the severe feudal doctrine of absolute forfeiture upon breach of a condition, whereas a pawn is in no respect an estate resting upon condition.

It would be a doctrine the most intolerable and oppressive. In one of the cases mentioned, a pawn worth 600*l.* was deposited to secure a loan of 200*l.* and if no time be mentioned, and the pawnee can *sell when he pleases, * 213
without first calling on the pawnor, or if the pawnor's right is gone by his sudden death, the law would establish a most disgusting speculation, infinitely more odious than the *lex commissoria;* for that was founded upon express agreement. And although the executor may not redeem, the pawnee has still his election to sue, and the executor has not even the privilege of the equitable rule, *qui sentit onus debet sentire commodum.*

It may be well enough to observe, by way of illustration, that except in cases of special agreement, the *Roman* law never allowed a pledge to be sold by the creditor, but upon

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notice to the debtor, and the allowance of a year's redemption.† And as this was not sufficiently observed, *Justinian* regulated the method of foreclosure by a particular ordinance, by which two years' notice or two years after a judicial sentence was allowed to the debtor.‡

It was moreover a well settled rule in that law, that the creditor could never hold the pledge by prescription; and that no length of time would preclude the debtor and his representatives from the right to redeem, and the reason given is very conclusive, because the creditor holds not as his own, but in another's right; "*alieno nomine possidet.*"§ I believe there is no country at present, unless it be *England*, that allows a pledge to be sold but in pursuance of a judicial sentence.¶

The third point raised in this case is as to the necessity of payment or tender of the money loaned *previous to the commencement of the suit. The payment of the money and the return of the pledge were to be concurrent acts, to be performed by each party at the same time and place.†† Each must show a capacity and readiness to perform, and yet neither was to trust the other personally. The one was not actually to part with his money, unless the other at the same time showed a capacity and readiness to return the pledge; nor was the one to return the pledge until the other showed, at the same time, the like capacity and readiness to pay the money; the acts being reciprocal, and one dependent upon the other.

But when one party has *incapacitated* himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require. If the one party *discharges* the other from a performance, by saying he will not perform on his part, (and voluntarily and tortiously rendering himself unable to perform his part is equivalent to such discharge,) it is well understood that it is not necessary for the other party to go forward. This was so decided in

† *Perezius on the Code, vol. 2. 62. tit. 34. sec. 4, 5. do. p. 58. Huberus, vol. 1. p. 157. sec. 2. vol. 3. p. 172. sec. 6.*

‡ *Inst. lib. 2. tit. 8. sec. 2. Dig. lib. 13. tit. 7. c. 4. Code, lib. 8. tit. 28. c. 4. and tit. 34. c. 1.*

§ *Dig. lib. 41. tit. 3. c. 13. Code, lib. 4. tit. 24. c. 10. See also Perezius, vol. 1. p. 267. sec. 12, 13. and 1 Domat. 368. sec. 7. Huberus, vol. 3. p. 1077. sec. 11. See also Halled's Gentoo Code, p. 118. which allowed a redemption after the debtor's death.*

¶ *Huberus, vol. 3. 1072. sec. 6. and Perezius, vol. 2. 63. sec. 8. as to Holland and Brabant. Domat. vol. 1. 362. sec. 9, 10. and 2 Erskine, 465. as to France and Scotland.*

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†† *Kingston and Preston, Doug. 691. 4 Durnf. 464, 465. 1 East, 208. 5 Viner, 84. in notis. Turner v. Goodwin.*

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the case of *Jones* v. *Barkley*,† and the same principle has been frequently advanced in other cases. In the case of *Judah, &c.* v. *Kemp*, decided in this court, *October* term, 1801, the suit was in trover for goods; the plaintiff proved property and a demand and refusal; the defendant was master of a vessel and had a lien on the goods for freight; on demand he refused to deliver the goods, and said he had not orders to deliver them; no tender of the freight, nor even a capacity to make one was shown; the defendant did not object to deliver on that, but upon another ground. The only question raised was, *whether tender of the freight ought to have been made, and the court decided that it was not necessary, as the act would have been useless, and they gave judgment for the plaintiff.

† *Doug.* 684. *Rawson* v. *Johnson*, 1 *East*, 203.

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The last question is as to the rule of damages. If the direction of the judge was correct, or if the rule is to be given by the court, then the verdict is to stand, and to be made conformable to such rule. But if the damages are to be considered as in any degree subject to the discretion of a jury, a new trial is to be awarded.

There is no doubt but that the measure of damages is sometimes a question of law, but more frequently it is to be left at large to the discretion of a jury. In cases where there is a criterion for an accurate computation, that criterion must be followed, and it becomes, then, a rule of law.

The value of the depreciation note is the measure of damages in the present case; and the only question is, how that value is to be ascertained. If it is to be ascertained from the face of the note? or from what time is that value to be computed? There must be some rule or principle on the subject, and that principle, whatever it may be, is a question of law, and not of an arbitrary *ad libitum* discretion in the jury. A great part of our common law jurisprudence is only a collection of principles, to be selected and applied to particular cases, by the discernment and diligence of the courts. I have no doubt the rule in the

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present case is a rule of law, and the only examination is to discover it.

The direction at the trial was, the value of the certificate in 1799, when the plaintiff went to make a demand. This must not be understood to mean, *that the cause of action arose then. From that ground the direction would have been erroneous. Putting out of view the previous sale, the plaintiff has not shown a cause of action by his act in 1799, for he ought at least to have shown, that he went with a readiness and a capacity to pay. The mental inability of the defendant may have rendered him incapable of receiving an actual demand from the plaintiff, but it surely is not to be construed into a discharge to the plaintiff, from the performance of his duty, which was to come with a disposition and ability to perform his part of the contract; that act of the plaintiff was, therefore, wholly immaterial as a ground of action, and if the value of the note is to be estimated from that date, it must be because the plaintiff manifested his will to have it then restored.

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The value of the chattel, at the time of the conversion, is not, in all cases, the rule of damages in trover; if the thing be of a determinate and fixed value, it may be the rule, but where there is an uncertainty, or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at the time he calls upon the defendant to restore it, and one of the cases even carries the value down to the time of the trial.

The cases of *Fisher* v. *Prince*,† and of *The Administrator of Hunt* v. *Fuller*, have long since settled, that if the chattel after the conversion increased in value, or be attended with other circumstances, the damages may be enhanced accordingly. And in the case of *Shepherd*, *Executor*, &c. v. *Johnson*,‡ the defendant was sued for breach of contract, in not replacing *a certain quantity of stock by a given day, and the court held, as the direction had been to the jury, that the plaintiff was entitled to recover, not merely

† 3 *Burr.* 1363. 2 *Black. Rep.* 902. *See also* 6 *Durnf.* 696.

‡ 2 *East*, 211.

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the value of the stock as it stood at the day, but the value as it stood at the time of the trial. And they said it was no answer to say, that the defendant might be prejudiced by the plaintiff's delay in bringing his action, for it was his own fault that he broke his engagement, and he might replace the stock at any time afterwards, so as to avail himself of a rising market; I have no doubt it is just and right that the plaintiff in the present case ought to recover the value of the note at the time he chose to demand it; he has selected that time to call for his note and to liquidate its value, and no other measure of damages short of that will indemnify him for the loss of the pledge; I agree, therefore, on this ground, to the direction that was given.

These were all the points that were stated in the case, or raised upon the argument; and they being with the plaintiff, I take it for granted he is entitled to judgment, and a new trial ought to be denied.

John Vandenheuvel *against* the United Insurance Company.

In an action on a policy of insurance, the sentence of a foreign court of admiralty, is not conclusive on the character of the property.

IN error on a judgment of the supreme court, in an action on a policy of insurance on the freight of "the good *American* ship called the *Astrea*, at and from *New-York*, to *Corunna*," the freight valued at ten thousand dollars, at a premium of fifteen *per cent.*

*At the trial in the court below, the jury brought in a special verdict stating, among other things, * 218

That the policy was underwritten by the defendants in error, in consequence of a written application made to them, by the plaintiff in error, in the words and figures following, to wit:

"*New-York*, 14*th November*, 1798.

"*Gentlemen*—What will be the premium on the ship, freight and cargo of the *Astrea*, captain *Price*, consisting in

mahogany, *tobacco*, *staves*, *dye-wood* and *sugar*, at and from *New-York*, to *Corunna*, to sail in eight days, property of the undersigned.

J. C. VANDENHEUVEL."

That the ship in the course of her voyage was captured by a *British* frigate, and carried into *Gibraltar*, where she, together with her cargo, were libelled in the court of vice-admiralty, and condemned as lawful prize to the captors, "as belonging at the time of her capture to *Spain*, or to persons being subjects of the king of *Spain*, or inhabiting within the territories of the king of *Spain*, enemies of the king of *Great Britain*." That the freight, by reason of the capture and condemnation aforesaid, was totally lost to the plaintiff in error, who duly abandoned the same to the defendants in error, exhibiting to them at the same time, due proof of loss and interest; that the freight was really the property of the plaintiff in error, and the ship and cargo were also his property, unless in judgment of law the plaintiff in error is concluded by the said sentence of condemnation; that the ship, at the time of the capture was registered as an *American* vessel, and had all the papers
* 219 which an *American* vessel usually has; that *the plaintiff in error was born a subject of the *United Netherlands*, and continued such until the 3d *June*, 1793, when he became a naturalized citizen of the *United States*, according to law; and the defendants in error, at the time of underwriting the said policy of assurance, well knew that the plaintiff in error was born a *Dutchman;* that the sum due to the plaintiff in error, supposing him to be by law entitled to recover a total loss, is 4,365 dollars and 6 cents, and the sum due to the plaintiff in error, for return of premium, supposing him to be by law entitled to recover no more than a return of premium, is 700 dollars. After stating these facts, the verdict submitted the following questions to the decision of the court.

1. Whether the plaintiff in error is by law entitled to re-

cover the said sum of 4,365 dollars and 6 cents, being the amount of a total loss?

2. If the plaintiff in error is not by law entitled to recover a total loss, whether he is by law entitled to recover the said sum of 700 dollars, being the amount of return of premium.

3. If the plaintiff is not by law entitled to recover a return of premium, whether he is by law entitled to recover any sum whatever.

On this verdict the supreme court, after argument, decided, that the plaintiff in error was not entitled to recover as for a total loss on the said policy of assurance, but that he was entitled to recover a return of premium, whereupon judgment was entered for the plaintiff in error for the sum of 700 dollars.

*In deciding on this case, BENSON, KENT, and RADCLIFF, Justices, thus delivered their opinions. * 220

BENSON, J. The principal inquiry in these causes is, respecting the effect of a *foreign* condemnation, the property in the goods condemned being intended in the insurance of them as neutral; whether the condemnation is not conclusive against the assured? This question has heretofore come before us, but until the arguments which have taken place in the present cause, it does not appear to me to have been so fully examined as the difficulty and importance of it require.

A condemnation may be viewed, as consisting in its cause and in its principles, as to be discriminated from each other; and the principles may be divided into those which relate to the law, and those which relate to the fact, comprehending in the fact the proofs.

The distinction between the cause and the principles of a condemnation is exemplified in a case read on the argument from a late *English* reporter, 7 *Term Rep. Geyer* v. *Aguilar*, where one of the judges distinguishes between them

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as here intended; he expresses himself: "The ground on which the courts in *France* proceeded, was, that this was a capture of *enemy's property*, and it certainly is not contrary to the law of nations to condemn a ship on that *ground*. Whether or not those courts arrived at that conclusion by proper means, I am not at liberty to inquire," &c. which is equally as if he had said, the cause of the condemnation as declared by the courts of *France*, is, that the ship was enemy's property; and which is a sufficient cause of condemnation by *the law of nations; but what were the *principles* of the condemnation, namely, what were the proofs, or what was the fact as found by those courts from the proofs, or what was the law as adjudged by them to arise from the fact, I am not at liberty to inquire, &c.

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Insurances may be divided into general and special. A general insurance, is where the perils insured against are such as the law would imply from the nature of the contract of a marine insurance considered in itself, and supposing none to be expressed in the policy. A special insurance is where, in addition to the implied perils, farther perils are expressed in the policy; and they may either be specified, or the insurance may be against *all* perils.

We have had an instance of each kind of these special insurances; of the latter, in the case of *Goix* v. *Knox*, "where, besides the usual risks enumerated in printed policies, it was declared by a clause in *writing*, that the assurance was to be against *all* risks." And in the former, in the case of *Gardiner & others* v. *Smith*, "where the insurance was against the risks, among others, of *contraband and illicit trade*," and the goods were seized at *Jamaica*, while landing, and condemned as contraband and illicit by the law of that place; and cases may be supposed where, although the property is insured as neutral, the insurer may, nevertheless, expressly take on himself the peril of condemnation, for breach of blockade, or for any other specified or enumerated cause; and in every such case, should there be a condemnation, the assured must be allowed to show,

either by the condemnation itself, if it furnishes the requisite evidence, and if not, then by such matter extraneous *to it, as, under the circumstances of the case, may be admissible in evidence, that the condemnation was for some *one* of the causes specified in the policy; and so far, and to that intent, doubtless, the condemnation is examinable in the suit, by the assured against the insurer. * 222

The cases at bar are, as it respects the perils of condemnation, cases of general insurance as here explained.

Where the property is insured as neutral, the law intends not only that the neutrality, as an ingredient or quality in the property or ownership of the goods then exists, but likewise that it shall be preserved during the continuance of the insurance, and, consequently, that there shall not be any act or omission, either by the assured himself, or by others, whose acts or omissions may in that respect be deemed to affect him, to forfeit it; and the neutrality constitutes as it were, a *title*, the existence and preservation of which, either in himself, or in the other persons, if any, on whose account the insurance may be made, or for whose benefit it may, in consequence of a subsequent transfer of the goods, be to enure, the assurance is deemed to warrant; and this warranty, from the assured to the insurer, is a condition of the insurance, or the indemnity from the insurer to the assured.

Every condemnation is either *rightful* or *wrongful*. If the captured goods, being duly defended in the court of the captors, by alleging and proving the title of the assured as above defined, should, notwithstanding, be condemned, the condemnation will be wrongful. Every other condemnation is to be taken *as rightful, including a condemnation by default, no person appearing to defend the goods; and where the condemnation is wrongful, it must be attributed either to the error of the *judge*, as it relates to the law, or as it relates to the fact as deduced from the proofs; or error in the witnesses, as it relates to the proofs, in testifying differently from the truth; and whether the error, either of * 223

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the judge or the witnesses be innocent or wilful, can never affect the question, whether the assured hath or hath not a right to controvert the condemnation.

If the assured has any such right, he must have it either limitedly, to controvert the principles which relate to the law, and not those which relate to the fact; or those which relate to the fact, and not those which relate to the law; and if to controvert those which relate to the fact, still he is to be *confined* to the proofs as they were before the judge, by whom the condemnation was pronounced; or he must have the right *unlimitedly*, or, as it is expressed in the case of *Hughes* v. *Cornelius*, 2 *Show.* 232. to controvert the condemnation "*at large.*"

It will readily be perceived, that as the principal question, whether the assured is or is not to be concluded by the condemnation, may be differently decided; so will the situation of the insurer be varied from certainty of safety, to the mere expectation or possibility of it. If the condemnation is to be conclusive against the assured, then, however, there may have happened a "capture, *a taking at sea*," and so the case within the very terms of the policy; yet if, further, there has been a condemnation of the goods, the
* 224 insurer is safe in an absolute sense; but *if the assured may controvert the condemnation, the safety of the insurer then becomes uncertain of course; in like manner, though in less degree, may the situation of the insured be varied, as the several questions respecting the limitations of the right of the assured to controvert the condemnation, may also be differently decided.

In some cases it may be more favourable for the insurer, that the assured should controvert the law and not the fact. In others, again, that he should controvert the fact and not the law; and it must ever be most favourable to the insurer, that the assured should be precluded from producing *new* proofs; and this difference of situation must be viewed as material, in the *greater* number of cases, which probably will happen; not only so, but some may easily be conceiv-

ed, where, as it respects the certainty, or possibility, that the assured can, or cannot, succeed in showing the condemnation to be wrongful, may wholly depend on a different decision one way or the other, of these questions, taken singly; before, therefore, it can be declared that the right of the assured to controvert the condemnation is limited, the rule whereby *some* of the limitations of it here suggested, are to be adopted, and others to be rejected, *ought to be shown.* It may, however, be safely asserted, no such rule exists; the limitations themselves, the distinctions that where a judgment is alleged, the party against whom it is alleged may controvert it as to the law, but not as to fact; or as to the fact, but not as to the law; and if as to the fact, that he is still to be concluded as to the proof, not being known in the law; and I cannot discern them, as *to be inferred from any thing peculiar in the contract of insurance; so that the right of the assured to controvert the condemnation not being susceptible of limitation, if, therefore, he has the right, he must have it unlimitedly, to controvert the condemnation *at large.*

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It is now to be stated, that where the property is insured as enemy's property and a capture by an enemy, the other belligerent party, it is inevitable that the goods will be both actually and rightfully condemned; they are as much lost to the assured as if they were captured by a pirate, and can no otherwise ever happen to be recovered to him than by a recapture; and he may, in such case, abandon instantly on the capture. But where the property is insured as neutral, there are means, which, as to be distinguished from the forcible or physical means of recapture, may be denominated *moral means*, whereby, until a condemnation shall have taken place, it is *possible* the goods may be recovered: there may be a claim and defence of them in the court of the captor; and although it is stated as *possible* only that the goods may, by a defence of them, be recovered; yet, if it was requisite to the argument, it might be stated as the intendment of law that it is *probable;* for if the title of the assured should

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be duly alleged and proved, and the goods should, notwithstanding, be condemned, the condemnation, as has been already stated, must then be to be attributed to the error, either of the judge or the witnesses, and the law will never presume error *beforehand.* If, however, there is a *possibility* only, that, by a defence of the goods, a *condemnation of them may be prevented, it is sufficient to make it the duty, either of the assured or the insurer, to defend them, or to bear the loss, if they should be condemned undefended; but it will be perceived the law can never impose it on the insurer to defend them.

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Where lands are granted with warranty, if the grantee is sued by a person, claiming by better title than the title of the grantor, he may, as it were, abandon to the grantor; he can compel him to appear in court, and defend the land; he may *vouch* him, and thereby substitute him as the defendant to abide the event of the suit "*for loss or gain;*" and he is the party to be presumed best cognisant of the title. Such is the rule in the case of a warranty, in the nature of a general contract of indemnity, from grantor to grantee; but if the assured may abandon to the insurer on the capture, and impose the defence of the goods on him, the rule will be reversed; the warrant*or* may then substitute the warrant*ed*, as the defendant, and the defence of the title will then be imposed on the party to be presumed not only least *cognisant* but even wholly *ignorant* of it.

The warranty in a grant of land being an indemnity against the acts of others claiming by title, and consequently not against entries by persons not so claiming, nor against assumptions of the land by the public authority of the state, nor as to any matter which may have come to exist thereafter; it may be said to be an indemnity against title only, and not against casualty; and, accordingly, if there should be a judgment against the title of the grantor, whether rightful or wrongful, he is alike held to indemnify *the grantee for the loss of the land; but where the property is insured as neutral, the warranty of the title, so far from be-

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ing by the insurer to the assured, being by the assured to the insurer, the insurance can be a warranty or an indemnity, not against title, but against casualty only, against tortious acts of private persons, and so unauthorized by law, or the acts of the state, such as reprisals, embargoes and impressments, the acts, in neither case, however, proceeding on a supposed total absence, or a defect, or forfeiture of the title, as warranted by the assured; another consequence, therefore, of a supposed right in the assured, to abandon on the capture, and impose the defence of the goods on the insurer, will be, that the insurance will thereby be essentially changed from being an indemnity against casualty only, to be likewise an indemnity against title, and against a want of that very title, which, as has been stated, the assured warranted to be existing, and that it should be preserved.

Farther—If the assured may abandon on the capture, he is entitled then, also, to sue for the loss, and the insurer must, accordingly, litigate the suit, in expectation it may be in his power to prove either that the property was not neutral, or that the neutrality had been forfeited, and so a breach of the warranty, and involving as a consequence, that the goods may be rightfully condemned; or he must pay the loss *voluntarily*, and also *instantly*, any credit allowed in the policy, being wholly of special or positive compact or regulation, and not arising from the insurance considered in itself. If he litigates the suit on the policy, he must relinquish a defence *of the goods in the court of the captor, or * 228
expose himself to the palpable incongruity of insisting in the suit by the assured, that the goods may be rightfully condemned, and of insisting, at the same time, in the suit by the captor, that they are neutral property; that the neutrality has been preserved, and, therefore, that they cannot be rightfully condemned. On the other hand, if he voluntarily pays the loss, he then precludes himself from afterwards alleging a breach of warranty; for, although I forbear from an opinion, whether the insurer can or cannot recover back the money paid for a loss, as having paid it, not know-

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ing at the time, certain facts, which, if he had known, he might thereby have discharged himself from the insurance; yet, I have no difficulty in declaring, that the facts must be such as it may be supposed he could not be so apprized of them, as to be put on an inquiry, or to be on his guard respecting them, which, however, can never be said to be the case, where goods being insured as neutral, are captured by a belligerent, it being to be intended, as will be more particularly stated hereafter, that they were captured, as charged to be enemy's property, although insured in the name of a neutral; and, therefore, if the assured will, notwithstanding, voluntarily pay the loss, he will then be deemed for ever to have waived or renounced his right to allege the breach of warranty; and the case will be within the general rule, that if a party shall omit to allege a fact, existing at the time, and whereby he might have defended himself against a recovery, he shall not, as against the other party in the suit, be allowed to avail himself of it thereafter, and which was recognised in the court of errors, in the case of *Le
* 229 *Guen, *Appellant*, v. *Gouverneur & Kemble, Respondents*; where the appellant having placed goods in the hands of the respondents, as his agents, to be sold, and having himself made a contract for the sale of them to *Gomez & Co.* but leaving the sale still to be perfected by the respondents, the notes given in payment, were, accordingly, to them in their *own* names, and the vendees having, before the notes became payable, proceeded to *France* with the goods; "he demanded from the respondents an authorization to receive there, whatever sum should remain of the proceeds of the goods, so sold on his account, to the above vendees, after first deducting and reserving at their disposal, such sum as should be completely sufficient to cover them, for the general balance of their account;" and they refusing to give him the authorization, he brought a suit against them in this court for the refusal, as for a breach of orders, whereby they had become instantly liable for the value of the *whole* of the sale, and on a special verdict he had judg-

ment, and to the amount so claimed by him. The respondents thereupon filed their bill in the court of chancery, to the effect of a suit at law, to *recover back* a payment, to enjoin him from proceeding on the judgment, "suggesting that subsequent thereto, on the trial in the suit which they had brought on the notes against the vendees, a verdict had been found for the defendants, on the sole ground of a fraud having been practised by the appellant in the sale of the goods," by affirming or warranting them to be of a better kind or quality than they were, "and the Chancellor ordered an issue at law to try the fraud. A question, however, was reserved by the counsel of both parties, to be determined as a preliminary *to the trial, whether the respondents were not precluded by the antecedent circumstances, from insisting upon the alleged fraud as a ground of relief? The Chancellor decreed they were not so precluded, and confirmed the order for the trial, and on the appeal, the decree was reversed, and the respondents' bill in the court of chancery was ordered to be dismissed." If, therefore, the assured may abandon on the capture, and as the insurer must accept the abandonment, and pay the loss, then, although it might afterwards be proved *undeniably* in the court of the captor, that the property was not neutral, the insurer would, notwithstanding, be without any means of restitution.

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These considerations are sufficient to show that the assured cannot abandon on the capture; that it is necessary the goods should be defended in the court of the captor; that the defence of them remains on him; and that he cannot cast it on the insurer. It is, however, at the same time to be stated, that if, having made a defence in the court of the captor, the assured may still afterwards controvert the condemnation *at large* in the suit on the policy, it is obvious such previous defence can be estimated as a mere formality only; that nothing is gained by it to the insurer, but that he is left in the like disadvantageous situation as if he, and not the assured, had to defend the goods in the

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court of the captor; for although in the suit on the policy, instead of *defending* he will have to *defeat* the title of the assured, still the one case, equally as the other, involves the truth or falsehood of the *same* facts; so that the reasoning, from what has been stated, terminates in this conclusion, that the *right* of the assured to controvert *the condemnation, if it does exist, can exist no otherwise than to controvert it *at large;* that it is his duty to defend the goods against a condemnation in the court of the captor, and that the right and the duty being incompatible, the right must be declared not possible to exist. Lest, however, the reasoning, as it may respect the question, whether the assured can or cannot abandon instantly on the capture, may be considered as inconclusive and unsatisfactory, unless it be shown when he can abandon, it may be requisite still briefly to state, that besides the case of a capture by an enemy, the opposite belligerent party, where the goods are insured as enemy's property, and a capture by a pirate, there is another case where the assured may abandon on the capture: The case of a capture by way of reprisal, and which, indeed, is in the nature of a capture by an enemy, but that every other capture being necessarily by a friend, in relation to the captured, must be intended to be that the goods are to be carried into a port of the captor, for a regular and authorized examination or adjudication, whether they are or not lawful prize, either as being *covertly enemy-property;* or if neutral, that the neutrality has become forfeited, and the assured being held to follow the goods and defend them, and the condemnation being conclusive against him, should they be condemned, it results that he can abandon only in the event of their being restored to him, and the voyage, in consequence of the capture and detention, *broken up;* and if the insurer shall thereupon pay the loss, then, whatever right or remedy there may be against the captor, will enure to his benefit.

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*The practice in *France* has been urged as a precedent, and *Emerigon* has been read on the argument, to show

what is there received as law on the subject. "The act of the prince is put in the class of casualties (*La classe des cas fortuits*) and such also is the case (*Il en est de meme du fait*) as to the unjust sentence of a magistrate; and it is of no importance whether the injustice proceeds from the corruption of the judge or his ignorance; so that it is then certain, that the insurers shall answer for an unjust condemnation pronounced by the tribunal of the place into which the captured ship shall be carried, judgments rendered by foreign tribunals being of no weight in *France* against *Frenchmen*, the cause being to be decided anew; whence it follows, that a judgment of condemnation pronounced by an enemy-tribunal, is no proof that there hath been a concealment of the *real* person *for whose account* the insurance was made (*que le veritable pour compte ait eté caché*) nor any title (*un titre*) which the insurer may allege to avoid paying the loss. Such is our jurisprudence." *Emerigon*, c. 12. s. 20.

The last sentence may be expressed in other words, "such is our interpretation of the contract between the assured and insurer, as to the right of the assured to controvert a foreign condemnation, the property being insured as neutral." The argument, as contained in what is here cited, is, that an insurance being an indemnity against casualty, and an unjust foreign condemnation being a casualty, an insurance is therefore an indemnity against an unjust foreign condemnation; and the act of the prince being a casualty, the proof of the minor term in the syllogism *consists in an assertion, that the act or unjust sentence of a magistrate, is to be classed equally with the act of a prince among casualties; whereas it is difficult to conceive two acts less of the same class or nature, and especially as it respects assured and insurer, than the act of a prince in the exercise of mere sovereignty, arresting goods either for permanent appropriation, or for temporary use, or detention only, and the act of the magistrate in function as a judge between captor and captured, condemning the goods as for- * 233

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feited to the captors. The act of the prince is arbitrary, and can be justified only from necessity, for reasons of state, and may consist with an admission of a perfect title to the goods in the captured, the person from whom they may be taken; whereas, the act of the magistrate is judicial, and if right, can be only so, as warranted by the law of property, and is in denial of the title of the captured. In case of an arrest by a prince, the right of action of the assured accrues by the arrest, and, therefore, whether it can be justified or not, is never brought into question; but where there is a condemnation by a magistrate, the right of action does not accrue by the condemnation itself, it can only be conceived to accrue by the supposed injustice of it. If the arrest, the act of the prince, is of that class of acts for which the insurer is to answer; then it is immaterial whether it is a foreign or domestic arrest, if the term "domestic" may, for the sake of brevity, be used and applied to an arrest by a prince, and a condemnation by a magistrate, to distinguish it as having happened in the same, and *not in a different nation from that where the assured shall have sued on the policy, the insurer is equally to answer for the one as the other; but as it relates to a condemnation, the distinction between foreign and domestic is essential; the right, as contended for, being to controvert a foreign condemnation only; and, consequently, a domestic condemnation is always to be received as conclusive against the assured; hence, it is evident, that if an unjust sentence of a magistrate is a casualty for which the insurer is to answer, it cannot be so as being of the same class with the act of the prince: or that if it should be admitted to be a casualty, as being so of the same class, or *like* an act of the prince, then, as the insurer is equally to answer for the arrest, whether it is domestic or foreign, so ought he, in like manner, to answer for the condemnation, whether it is domestic or foreign; and, therefore, that as far as the argument for the right of the assured to controvert a condemnation, depends on a supposed *similitude* between an unjust con-

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demnation by a magistrate and an arrest by a prince, and so far as it also depends at the same time on the distinction between a foreign and domestic condemnation, and that the right is only to controvert the former but not the latter, it is at variance with, and, consequently, defeats itself.

Emerigon, in farther support of the assertion—" that an unjust condemnation is a casualty, for which the insurer is to answer," refers to *Roccus*, Not. 54. " *Merces captæ a potestate. seu judice justitiam administrante in illo loco, aut a populo, aut ab aliqua quacunque persona per vim, absque pretii solutione, tenenter assecuratores solvere æstimationem *dominis mercium, facta prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus, ut probat Stracc: De Assecurat: Gloss: 20. et sequitur Joan: de Evia in Labyrint: Commer. naval: lib. 3. c. 14. numb. 27. et melius fundatur ex dictis a Santer: De Assecurat: pars 4. num. 20. ubi adducit casum de injustitia facta, ab aliquo judice ex quo merces amittantur vel damnum aliquod sentiant, an comprehendatur sub promissione* casus fortuiti *et assecurator teneatur? Adducit Bart: in L: exceptione col: penult: in fin: ff: de fidejusso; ubi illud, quod judex facta injuste, quoad partes, dicitur* casus fortuitus, *et pertinet ad emptorem rei, et sic videtur in assecuratione quod pertinet ad illum qui in se suscepit* casum fortuitum." I do not possess the authors here referred to by *Emerigon*, but I find the last, *Bartolus*, referred to by *Perezius*, as a writer on the civil law. Recourse, therefore, must be had to that law to discover the evictions of the things sold, (the condemnation intended by him as casualties, (*casus fortuiti*) and so belonging to the buyer *qui pertinet ad emptorum*,) to bear the loss himself, to be as distinguished from those for which the seller is to answer, in order thereby farther to discover, whether in a suit judicially heard and determined between captor and captured, a condemnation of the goods as a prize to the captors for want of title in the captured, and alleged to be wrongful, is an

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eviction of the captured, the assured, for which the insurer is to answer? "*Tenetur de evictione venditor—Porro evicta re datur emptori actio adversum venditorem—Est ex empto actio, quæ inest natura contractus**—*Cessat evictionis præstatio ob culpam emptoris—Culpam committet emptor, neque de evictione agere potest, si, cum posset venditori denunciare, non denunciaverit motam controversiam, utque judicio adesset et rem defenderet, nam venditori poterat fuisse justa defensionis causa utpote* scienti melius *rei a se venditæ* jus *et* conditionem—*Ac sic in causa evectionis sententia lata contra emptorem ei sit* regressus *contra venditorem si* vocatus *ab emptore venditor in judicio comparuerit ad* rei *defensionem eam que susceperit, quia nihil est quod imputetur emptori, qui, ut requiritur, denunciavit venditori motam litem, cui, quod eam defendere non potuerit, imputandum erit.*" *Perezii Prælect: in lib.* 8. *cod. tit.* 45. *de evictioneb,* From these passages, it is evident, that the evictions, intended by *Bartolus* to be deemed *casualties*, and so the loss by them to be borne by the buyer, must be of a different class or kind from an eviction for the want of title in the seller, he having been vouched to appear and defend his title (*vocatus ut in judicio compareat ad rei defensionem*) and the civil law, as to the warranty from the seller to the buyer, in respect to the eviction, or other act whereby the buyer may lose the thing sold, when the loss is to be borne by the buyer, and when the seller is to answer for it, being the same with our own law, it is not necessary, as an answer to the argument, from the supposed analogy between the case of seller and buyer, and the case of assured and insurer, to add to what has already been stated in comparing or contrasting a warranty in a grant of lands, with an insurance, the property being insured as neutral; and it only remains to be remarked *on *Emerigon*, considered as an *authority*, that *Roccus* himself, on whom he relies, does not, by the act of the judge in taking the goods, and for which the insurer is to answer, intend a judicial act or procedure between captor and captured in a case of taking or capturing goods as

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lawful prize; the taking, as he describes it, being within the territory where the judge has jurisdiction, (*captæ judice justitiam administrante in illo loco*) but a taking as a prize, it is to be supposed, would have been mentioned by him as taken at sea. That the injustice of the taking consists in its being without paying for the goods, (*absque solutione pretii*) necessarily importing that the captured, the person from whom they were taken, was entitled to be paid for them, and which again necessarily affirms his title to them; but when the goods are taken from the captured, and adjudged to the captors, the injustice, if any, as it respects the act of the judge, consists in an error in him in disaffirming any title in the captured, but not in his awarding the goods to the captors without any recompense to the captured. The official act, therefore, of the magistrate in taking the goods intended by *Roccus*, can be no other than an act in the nature of an impress, and for which the insurer is unquestionably to answer; and that to suppose an unjust sentence a casualty, so as that the insurer is to answer for it, is altogether fallacious; casualty being applicable only to a fact possible, that it will, or will not happen, until it either shall have happened, or, by the intervening happening of some other fact, shall have become impossible ever to happen; in each case, however, it equally ceases to be casual, *and becomes certain, in the one that it has happened, * 238
and in the other that it cannot ever happen; but that casualty is not applicable to the sentence of a judge on the question, whether it is just or unjust, or to any other mere opinion, whether it is right or wrong, declared on any subject. For although it may be afterwards demonstrated that the opinion is right, or that it is wrong, yet it never can become either certainly right, or certainly wrong, as having before been casual, whether it would be right, or whether it would be wrong. It is true that the law has ordained that every judgment, until reversed, shall be taken to be certainly right; if it should be reversed, it is then to be taken as certainly wrong, and the judgment of reversal is

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to be taken as certainly right. If the judgment of reversal should be reversed, the first judgment being thereby affirmed, is again to be taken as certainly right, and the judgment of reversal as certainly wrong; but this legal or artificial certainty is in no manner the same with that certainty existing in nature, and having as its opposite, casualty. Certainty, as opposed to casualty, is to be proved as a fact, to have either physically happened, or become impossible to happen, and not to be demonstrated as a proposition, either morally right or morally wrong. The opinion whether a sentence is just or unjust, may be ambulatory for ever. Thus it is manifest, that the practice in *France* is erroneous; and there is reason to suppose it to have proceeded from a misapprehension of the very authorities cited to prove it warranted by law or principle. It, however, having obtained, and being established in fact, in the nature
* 239 of a custom, or usage, it ought, perhaps, *not to be changed there; for both parties being apprized of it, they can make their calculations, as to the risk and premium, accordingly, and in that view of it, no injury will be produced by it; but it certainly can have no influence on the present inquiry, which is, as to the *true interpretation* of the contract, according to *universal* law, independent of any positive local practice whatever.

I will now briefly apply to the case of an insurance, the law, as declared in the case of *Hughes* v. *Cornelius*, already cited, it being the most ancient case in the books, as to the effect of a foreign condemnation; and the adjudication which took place in it, having never been questioned, the case is now to be viewed as of the highest authority.

The judges, in that case, not only assume it, that a domestic condemnation is to be received as conclusive, but they suppose that, therefore, a foreign condemnation ought likewise to be so received; they argue the conclusiveness of the latter from the conclusiveness of the former; they express themselves, "as we are to take notice of a sentence in the admiralty *here*, so ought we of those *abroad* in

other nations, and we must not set them *at large* again." It is true, the question was only as to the *direct*, and not as to the *collateral* effect of a condemnation; but the reasoning with which the judges close their opinion, that a foreign condemnation is to be conclusive, as to the direct effect of it, namely, "that if the captured is aggrieved, he must apply himself to the king and council, it being a matter of *government*, he will recommend it to his liege's ambassadors, if he see cause, and if not remedied, he may grant *letters of mart and reprisal," will equally apply, that it is to be conclusive as to the effect of it on an insurance; and not only contains a sufficient answer to the objections to receiving it as conclusive, as to such effect of it, but obviously supposes, that as to the several effects of a condemnation in respect to the conclusiveness of it, there is no difference between them.

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The objections to receiving a foreign condemnation as conclusive against the assured, if I have rightly understood them, and, indeed, as some of them are expressed by a late *English* writer on the law of insurance, *Park*, 363. also read on the argument, are, "that the judges of a foreign nation may possibly decide on their own municipal laws or ordinances, contravening, or not forming a part of the law of nations;" and further, that the judge of a belligerent nation cannot be viewed as standing indifferent between a neutral nation and his own, in deciding on the interfering rights of neutrals and belligerents, as depending on, or to be deduced from, the *law of nations*.

That even the most enlightened and upright judges may oftentimes, and in a great degree be under the influence of a *national* partiality, can scarcely be denied; such is human nature, "*parum cavet natura.*" But can neutral nations say they are less susceptible of interest or passion, than belligerent nations? Is not the armed neutrality in *Europe*, in 1780, to compel the *British* to acknowledge and observe it as a principle of the law of nations, that free ships make free goods, a proof of directly the reverse?

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Can our nation claim us, or can we claim ourselves, to *be more free than the judges of belligerent nations, from national partialities? If the assured is warranted in surmising a partiality in the belligerent judge, is not the insurer equally warranted in surmising it in us, and, consequently, will not justice between them as to the question, and according to its just and equal merits, whether the principles of the condemnation, as they relate to the law of nations, are right or wrong, be alike to be suspected as fallible, when declared by us, as when declared by the judges of the belligerent nations? But a sufficient, and, perhaps, the most proper answer, to the whole of the objection, is furnished in substance, by the judges in the opinion above cited from the case of *Hughes* v. *Cornelius*, that if a judge of one nation, in case of a capture at sea, will assume novel and false principles, as principles of the law of nations, or misapply, or unduly extend, or restrict such as may have been already received and sanctioned, or misinterpret a treaty, or decide wholly on the particular regulations of his own nation, repugnant to, or deviating from, the law of nations, or by whatever other erroneous reasonings or means, considered as the principles relative to the law in the case, he shall come to it as legal conclusion, that the goods captured ought to be condemned as prize, either as being enemy-property, or for breach of blockade, or as being contraband of war, or for any other cause whatever, every such condemnation would be a grievance on the captured, against which his nation is to claim and procure reparation for him. It would be perfectly a *casus fœderis;* a case where the nation, in virtue of the mutual obligation *of allegiance and protection, between sovereign and subject, would be held to interfere and remonstrate against the principles of the condemnation, and insist that they be disavowed or renounced, and that reparation be made to the captured; who, instead of seeking for indemnity from an underwriter, through the medium of a court of justice, must seek for it from the foreign nation itself, through the

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medium of the government or sovereignty of his own nation.

I conclude with remarking that, possibly, as I have already intimated, an insurer may, by especial or express insurance, take on himself the peril of an unjust condemnation; and something of that kind has been attempted, by inserting a clause in the policy to the following effect: "Warranted *American* property, and proof thereof to be made, if required, in *New-York* only;" but whether an insurance in this form, is sufficiently provisional or explicit? Whether it would be deemed to be against a condemnation for *any* cause, or against a condemnation for *some* causes only, and not *others;* and if so, which the causes are, as to be discriminated from each other? And especially, whether the assured may abandon on the capture, or whether he is not bound to follow the goods into the court of the captor, and there defend them? Or, in short, whether it is possible to devise a form, fully and distinctly providing for all the cases and events which may occur? Or, whether it is not unavoidable, that the whole must be put on the simple footing of a *war premium*, and a *war risk;* so that all understanding, representation, or warranty, that the property is neutral, and that the neutrality is to be preserved, and not forfeited, are to be altogether laid out of the *contract between the parties; are questions which I * 243
suggest, as probable to arise, but on which it is not necessary that I should express an opinion in deciding the case at bar, it being a case of general insurance, and where, for the reasons I have assigned, my opinion is, that a foreign, equally as a domestic condemnation, is to be received as conclusive against the assured.

RADCLIFF, J. This was an insurance on the freight of the *Astrea*, from *New-York* to *Corunna* in *Spain*. The policy was subscribed by the defendants on the 19th *November*, 1798, in consequence of a written representation from

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the plaintiff, stating the ship, freight and cargo *to be his property*.

The plaintiff was originally a subject of the *United Netherlands* and continued so till the 3d *January*, 1793, when he was naturalized as a citizen of the *United States*. He must, of course, have emigrated to *America* at least two years antecedent to that period, and before the *United Netherlands* were involved in the late *European* war, and he is stated to have been personally known to the defendants.

The vessel during the voyage was captured by a *British* frigate as *prize*, carried to *Gibraltar*, and with her cargo there condemned by the court of vice-admiralty, on the ground of her "belonging at the time of her capture to *Spain*, or to persons being subjects of the king of *Spain*, or inhabiting the territories of the king of *Spain*, enemies of *Great Britain*." From the situation of the plaintiff, and the representation to the defendants, the insurance must be considered as made upon *American* or *neutral property*. The representation is to this purpose equivalent to a warranty of that fact, and liable to the *same result. In my view of the subject two questions arise.

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1st. Whether, upon the *terms of the contract*, the plaintiff is entitled to recover?

2d. Whether, in respect to the *fact of neutrality*, he is *concluded* by the foreign sentence?

If upon the contract he would be entitled to recover, and is not concluded by the sentence, it is conceded or offered to be proven that the property was in reality neutral, or such as was so represented to the defendants.

The second question has already been twice determined in this court; first, in the case of *Ludlow* and *Dale*,† in which I gave no opinion, it being argued before I took my seat; and, secondly, in the case of *Goix* and *Low*.‡ In the last, although the subject in some respects presented itself to my mind in a different light, I was content to acquiesce in the opinion which had been previously delivered,

† *January* term, 1799.

‡ *April* term, 1800.

considering the rule to have been definitively settled as far as depended on this court. The magnitude of the question has induced us to review it in this and other causes, but notwithstanding the able and zealous discussion it has received, I can perceive no new lights on which to change my opinion.

It may be premised, that in the course of the argument much was said of the policy of the *English* courts in deciding this question in favour of the insurer, and the policy of our adopting a different rule. On a careful examination of the *English* decisions, I cannot discover any ground for this suggestion. They appear to rest on principles unconnected with any motive of policy, and are indiscriminately applied to their domestic as well as to foreign tribunals. *If the consideration were proper in determining a rule for ourselves, I am unable to perceive its force or application. * 245

In every instance of a foreign condemnation a loss must necessarily happen. If the property be really *American*, and insured here, the burthen must fall on some of our citizens. It is then a question between them solely, and it can never be politic or just to seek to shift the loss from one description of citizens to another. If the property be not *American*, and insured in this country, an interested policy, if such could be justified, would dictate an opposite rule of decision, and lead to protect the *American* insurer against the foreign owner, and thus determine the question against the insured.

Again, if the property be *American*, and insured abroad, the remedy is placed beyond the reach of our laws, and it would be a vain presumption in the courts of this or any other country to attempt to prescribe a rule for foreign tribunals. But I dismiss this topic as unconnected with the merits of the question. Opinions founded on policy are necessarily various and fluctuating, and ought never to actuate a court of justice. The question in every instance must depend on its intrinsic merits arising from the nature

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of the contract and the general law of insurance, unless restrained by positive regulations.

In this view of the subject, the judicial determinations of courts in different countries, as well as the opinions of individuals, may differ, but that difference, I apprehend, can never, as has been imagined, become a matter of *national* concern. The regular administration of justice, when conducted with good *faith, can never implicate the government with respect to foreign nations; and whatever rule may be established on this occasion, it can only be considered as affecting the rights of our own citizens; as existing between them solely. If foreigners should at all be interested, it must happen in consequence of their voluntary act to seek insurance here, and they cannot complain of the conduct of our courts, if they receive the same measure of justice which is administered to others. I therefore equally lay out of view every argument derived from this source.

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It is true there may be cases to interest the *government* in behalf of its citizens. When losses are sustained by the unjust sentences of foreign tribunals, there is no doubt but the party injured is entitled to apply to *his government* for redress, and that government, in case of *palpable injustice*, has a right to demand and enforce reparation from the sovereign of the aggressor—it is even bound to do so, or in its discretion to grant reprisals, or an indemnity to the injured party. It then, and not till then, becomes a question of *national* concern. As such, the delicacy and importance attached to it, as to all national questions, would require the government to proceed with caution, and in doubtful cases rather to presume that justice has been done than to impeach the integrity of foreign courts. Thus it is held, that it ought not to interfere but in cases of violent injuries, countenanced and supported by the *sovereign* of the aggressor, and where justice is absolutely denied *in re minime dubia* by all the tribunals and in the last resort.† This is the language of the most approved writers on public law, and is professed to be the practice of all civilized nations,

† *Gro. de Jure, &c. lib. 3. c. 2. sec. 4, 5. 1 Coll. Jur. 102, 103. Vatt. 257, 258.*

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and one† of those writers, perhaps the most eminent and correct, exemplifies the maxim by referring to the principles maintained by the *British* government on a similar occasion. Hence it will be admitted, as a general rule, that every government is bound to respect the judicial decisions of foreign courts, and in the first instance to consider them as just, and of course generally conclusive. But these reasons for the rule are strictly applicable to the government alone when acting in behalf of its citizens. They cannot apply to the conduct of our courts in the ordinary administration of justice. We actually see that the courts of *France* and *England* differ on the very question before us, and it has never been deemed a subject of *national* complaint by either. I therefore think that it is not on the ground of *national* interference or courtesy that such sentences in our courts are held to be conclusive; their conclusive quality depends on other principles.

‡ *Vatt.* The report on the *Prussian* memorial.

1st. As between the insurer and insured, in case of a representation or warranty of neutral property, I think a condemnation in a foreign court of admiralty, when founded on the want of neutrality, operates definitively against the insured according to the terms and effect of the contract itself. During the existence of a maritime war, the state of commerce is necessarily more or less precarious. Neutrals are not exempt from this inconvenience, but neutrality, if respected, affords a great advantage. The neutral merchant, when he effects an insurance, may either retain the benefit of his neutrality, or, if diffident of its security, he may relinquish it, and specially insure his property against every possible loss. If he *insure the property as neutral, he thereby signifies his intention to avail himself of his neutrality, and of course will pay a less premium; but in doing this it must follow that he takes upon himself the risk of that neutrality. He thus far *divides the risk*, and is to be considered his own insurer. He cannot, by paying a less

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premium, enjoy the benefit of his neutrality and at the same time the benefit of an insurance for the want of it.

It is obvious that every such representation or warranty is made, not with a view to an examination of the fact in our own courts, but in reference to the parties at war, and to the danger of capture and condemnation abroad. This is the direct object of the stipulation. It cannot be limited to the naked position that the property is in fact neutral. It may be so and yet possess none of the *indicia* or evidences of neutrality. These evidences, it is not denied, the insured undertakes shall accompany it, and I think he equally undertakes that it shall enjoy the privileges of neutrality.

There appears to me no room for the distinction that the insured engages to furnish the evidences merely, and at the same time not to maintain his neutrality when it may be called in question. If the proper evidences accompany the subject, it is not legally to be presumed that its neutrality cannot be maintained. Whatever abuses may occasionally be committed we cannot act judicially, nor suppose the parties to have acted on the presumption of injustice in foreign courts. The idea is inadmissible when applied to the courts of a civilized nation, and if contemplated by the parties
* 249 ought at least to have been *made the subject of a special provision in the contract. No doubt the underwriter may, by a special insurance, and the admission of a particular mode of proof, make himself liable even for the unjust sentences of foreign courts; but he ought never to be held liable for such sentences when proceeding on the very ground assumed by the insured himself. If neutrality can be called a risk, that risk is necessarily implied in the warranty; and the insurer, by the contract, is liable only to the remaining perils incident to the subject, allowing it to be neutral and to preserve that character. He engages for nothing more; and his premium must be deemed proportioned to those perils only. The effect of the representation or warranty, can, I think, on the face of the contract itself, admit of no other interpretation.

If this reasoning be correct, it follows, that the insured, having represented or warranted the subject to be neutral, can never, on the terms of the contract itself, recover against the insurer when it appears to have been condemned on a ground which denies its neutrality. It is immaterial, in this view of the subject, whether the condemnation be just or unjust; it is sufficient if it proceed on the want of neutrality.

2. The question in the *English* courts does not appear to have been examined in this light. They have been content to apply to the decisions of foreign courts of admiralty, a principle which has long been received and adopted in their domestic courts. They place them on the same footing, and consider the conclusiveness of their sentences as necessarily resulting from the right of jurisdiction. In relation to their own courts the rule has undoubtedly been *long established, both before and since the revolution, and it is not confined to courts of peculiar or exclusive authority, but applies to all. Not only the sentences or judgments of their ecclesiastical and other courts, where they possess exclusive cognisance, but the decisions of all their courts in cases where they have concurrent jurisdiction are deemed to be equally conclusive. Indeed, a contrary position would involve the absurdity of a power competent to decide, and at the same time ineffectual in its decision.

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They have also, in a variety of cases, extended the rule to foreign courts of a different description. Thus, a bill to be relieved against actions of trespass for seizing goods† in an island of *Denmark*, was dismissed in chancery, because sentence was given in the court of *Denmark* on the seizure. So in case‡ of a bill of exchange, the acceptance of which was vacated in a court of *Leghorn*, Lord Chancellor *King* held not only that the cause was to be determined by the *lex loci*, but the acceptance having been vacated by a competent jurisdiction, he thought the sentence conclusive, and that it bound the court of chancery in *England*. So by Lord *Hardwicke*,§ if a marriage be declared

† 1 *Ch. Cas.* 237. 26 *Car.* II.

‡ 12 *Vin.* 87. *pl.* 9. 2 *Stra.* 732, 733. *S. C. best reported in Viner*, (1726.)

§ 1 *Ves.* 159. (1748.)

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valid by the sentence of a court in *France* having proper jurisdiction, it is conclusive, and he held "that this was so, although in a foreign court, by the law of nations; for otherwise the rights of mankind would be very precarious and uncertain.

This doctrine applies, with peculiar force to the sentences of courts of admiralty in relation to *prize*, and of every court proceeding on the general law of nations as the basis of its authority. While the capture *of enemy-property

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is admitted to be the right of a belligerent party, the institution of courts to try the validity of such captures must also be admitted. They exist in every country, and are established in our own. The objects of their institution are every where the same. They are invested with similar powers, pursue the same principles, and profess to be governed by the same system of laws, unconnected with the municipal regulations of any country. In this manner they form a separate and independent branch of judicature, and although uncontrolled by a common superior, their determinations, while they act with good faith, will generally be uniform and consistent. Considering them in this light, acting on the same principles, and governed by the same law, they come within the reason of the rule which is applied to domestic tribunals of concurrent jurisdiction, and their decisions ought to possess equal force and authority.

But another principle of *English* and *American* jurisprudence arising from the nature of the subject, and the system of our courts, appears to me strongly to enforce this doctrine. The question of neutrality is involved in the general question of *prize;* it is a necessary incident, and the want of neutrality forms the principal ground of capture and condemnation. It is a settled maxim that the courts of common law have no jurisdiction on the question of prize; it may collaterally arise, but *ex directo* it is not within their cognisance; it belongs solely and exclusively to the courts of admiralty as courts of prize. This

is established by a current of authorities both ancient and modern, and the reasons on which they are *founded are satisfactory and conclusive. If then the courts of admiralty have exclusive jurisdiction of the principal question of *prize*, which necessarily includes that of neutrality, and the courts of common law have no jurisdiction, it must follow that the decisions of the former cannot be reviewed by the latter, and that whenever they occur directly or collaterally, they must like the judgment of other courts of peculiar jurisdiction, be considered as conclusive. If they were allowed to be reviewed, in what manner could we ascertain the merits of the former decision? Is the same evidence in our power, or in the power of the parties to obtain? The insurer is a stranger to the whole transaction; the circumstances are unknown to him; the proofs, if not detained abroad, are in the hands of his adversary; they are generally concealed, or may, with the greatest ease, be suppressed. How could he compel their production, or bring to light the merits of the case? To avoid these difficulties are we to be governed by the written depositions taken in the admiralty abroad, or could they be received as evidence? It is well known that the rules of evidence in those courts are different from our own. By what rules are we to be governed? If exclusively by our own, the result in our courts may differ, and yet both judgments as to the evidence on which they are founded be equally just. Allowing even that the insured engages merely to furnish the evidence of this neutrality in foreign courts, that evidence must surely be understood to be of a nature usually received and demanded in those courts; for it is there only that it can be material. The engagement relating to such evidence of course excludes *the idea of a decision upon any other, and the interferenee of a court of common law, requiring a different mode of proof, and acting on different principles, would contravene one of the direct objects of the stipulation. In every shape, therefore, in which this subject can be viewed, insuperable difficulties present

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themselves, and evince the propriety of considering the foreign sentences as final.

In *England* this question is at rest by direct decisions on the point, but these decisions were principally made during the period of our revolution, or subsequent to it; they possess, therefore, no conclusive authority, but under similar circumstances are to be regarded as we regard the decisions of the courts of all enlightened nations, high evidence of the law on the subject.

The cases in the *English* courts previous to the revolution are, however, not wholly silent on the question; so far as they relate to the general principle that the sentence or judgment of any court of competent jurisdiction is to be received as conclusive, they have already been noticed.

There are some which immediately apply to the sentences of foreign courts of admiralty. The first in which the effect of such sentences appears to have been immediately considered, was the case of *Newland* v. *Horseman*,† in chancery. That was on a question of *freight*, which had been tried in the court of admiralty at *Barcelona*, where an interlocutory judgment was given. Lord Chancellor *Nottingham* declared, that he would not slight their proceedings beyond sea, and if the damages had been there ascertained, or a peremptory sentence given, the same should have concluded all parties. *The next is the case of *Hughes* v. *Cornelius*,‡ in which, during a war between *France* and *Holland*, an *English* ship was taken by the *French* under colour of being *Dutch*, carried into *France* and there condemned by the court of admiralty as a *Dutch* prize. Afterwards an *Englishman* bought this ship, and brought her into *England*, where the right owner instituted an action of trover for the ship against the purchaser. This matter being found specially, the defendant had judgment, "because the ship being legally condemned as a *Dutch* prize, this court will give credit to the sentence of the court of admiralty in *France*, and take it to be according to right, and will not examine their proceedings, for it would

† 1 *Vern.* 21. 2 *Ch. Ca.* 74. S. C. (1681.)

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‡ *Carth.* 32. 2 *Show.* 232. S. C. (1689.)

be very inconvenient if one kingdom should, by peculiar laws, correct the judgments and proceedings of the courts of another kingdom." In the *Theory of Evidence*,† a book considerably ancient, it is stated, that "in an action on a policy of insurance, with a warranty that the ship was *Swedish*, the sentence of the *French* admiralty condemning the ship as *English* property was held to be conclusive."‡ The same case is repeated *in hæc verba* by Mr. *Buller*, in his *Nisi Prius*, and has received the sanction of his name. He cannot be understood to refer to the case of *Hughes* and *Cornelius*, as has been suggested, for that was not of a *Swedish* ship, nor on a policy of insurance. There is still another case§ of *Fernandez* v. *De Costa*, in 4 *Geo.* III. before Lord *Mansfield*, at *Nisi Prius*, in which there was a warranty that the ship was *Portuguese*, and being condemned as not being *Portuguese* in the admiralty courts of *France*, the sentence of condemnation appears to have been considered as *decisive in favour of the insurer. In this case, it seems, the law was received to be settled as to the effect of the sentence, and the inquiry was confined to ascertain the ground on which it went.

† An *Irish* ed. printed in 1761. p. 37.
‡ *Bull.* 244.
§ *Park*, 178. 3d edition, not elsewhere reported.

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In answer to the two former of these cases a distinction has been taken between the direct and collateral effects of a foreign sentence, that it is conclusive only as to the transfer of property for the benefit of all claiming under it, but not so as to collateral parties. I do not perceive the force of this distinction. If well founded it appears to me to operate in favour of the insurer; the insured, the professed owner of the property, must certainly be a direct party to the sentence, if any one is a party; he, therefore, if any one, must be concluded. Besides, from the nature of the proceedings in courts of admiralty, which are *in rem*, all persons are considered as bound. The forms and manner of proceeding in those courts are founded on the idea of notice to all the world, and the operation of their sentences is deemed to be equally extensive. The distinction now attempted, I do not find to be supported by any authority

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either before or since the revolution. Indeed, in *England*, the contrary rule prevails both with respect to their domestic and to foreign courts. It is general, that, "whenever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter."† It is not material that the parties to the suit should have been parties to the sentence; the only qualification of the rule, I believe, is to be found in *Prudham* v. *Philips*,‡ where Chief Justice *Willes*, in the case of a judgment alleged to be *obtained by fraud* in the ecclesiastical *court, took a distinction in favour of a *stranger*, who could not come in and vacate or reverse the judgment, and, therefore, must of necessity be permitted to aver the fraud; but he held that the party to the suit was bound by the sentence, in relation to all other persons, and could not give evidence of the fraud, but must apply to the court which pronounced the sentence, to vacate the judgment. It is, therefore, always sufficient, if the one against whom the sentence is offered, was a party.

† *Theo. of Ev.* 37. *Bull.* 244. *Amb.* 762, 763. and the cases there cited. 2 *Black. Rep.* 977.

‡ *Amb.* 763.

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I forbear particularly to examine the subsequent cases,§ during our revolution, and since, which, if any doubt could before exist, have unequivocally settled the law in *England*. The principle on which they are founded, is, I think, sufficiently supported by the antecedent cases. The *English* courts appear to have viewed those cases in the same light, and without treating the question as *res integra* have adopted the rule they prescribe. Indeed, from the time of Charles II. to the present period, it appears to have received a steady determination by the highest authorities in their courts. With them it seems never to have been much questioned, and, I conceive, the law with us must be deemed to be equally settled. It may be added, that the same point arose in *Pennsylvania*,¶ and, although not directly decided, Judge *Shippen* inclined to consider the foreign sentence as conclusive against the insured.

§ *Doug.* 544. *Park*, 359. 361, 362—three cases.

¶ 2 *Dall.*

In *France*, the law is undoubtedly otherwise settled.†† Their courts have adopted a different rule at an early period,

†† *Emerigon*, 457 to 464.—*Val.* 112. *art.* 48. See also *Rocc. n.* 54.

and the authorities on which they proceed, in cases of new impression, would merit great attention and respect; but independent of the circumstance that they confer no obligation on our *courts, I think they do not comport with the sound interpretation of the contract, nor with the system of our jurisprudence. The *English* courts, on questions of commercial law, are to be regarded as at least equally enlightened and correct, and their authority, before the revolution, repeatedly sanctioned and confirmed by subsequent determinations, imposes an obligation which the former do not possess.

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In every light, therefore, in which I have been able to view the subject, I am of opinion, that the foreign sentence ought to be deemed conclusive against the plaintiff's right to recover on the policy.

1. From the nature and import of the contract itself, by which I consider the insured to have guarantied his neutrality, and undertaken to maintain it, and, of course, liable to all the perils attending it.

2. Because the condemnation is to be considered as conclusive evidence of the want of neutrality, it being the sentence of a court, not only of a *competent* but *exclusive* jurisdiction on the subject.

KENT, J. This cause is on a policy upon the cargo and freight of the ship *Astrea*.

The facts are these.

The voyage was from *New-York* to *Corunna*, in *Spain*, and the ship was described as the good *American* ship the *Astrea;* and previous to the time of signing the policy, the plaintiff, in a written application for that purpose, to the respective defendants, represented the property to be *his own*. The ship was captured on her voyage by a *British* frigate, carried into *Gibraltar*, and by the court of vice-admiralty there, the ship and cargo were condemned as lawful prize, as belonging, at *the time of the capture, to *Spain*, or to persons, being subjects of the king of *Spain*, or inha-

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biting within the territories of the king of *Spain*, enemies to the king of *Great Britain*.

If the plaintiff is not to be adjudged concluded by the sentence, it is then admitted in the case, to be a fact, that the ship and cargo were the plaintiff's property.

The plaintiff was born a subject of the *United Netherlands*, and became a citizen of the *United States*, on the 3d day of *June*, 1793, and has since resided in the city of *New-York*.

Upon these facts, the whole question between the parties turns upon the effect of the sentence of condemnation. If that is to be deemed conclusive proof of the facts therein stated, the policy is void, by reason of a breach of warranty, and by reason of a *material misrepresentation*, which led the underwriters to compute the risk upon circumstances which did not exist.

The sentence substantially *falsifies* the representation, for the persons, stated in the sentence as owners of the property, and the plaintiff, were evidently understood and intended to be different persons.

After the opinion which I have already given upon the question, in the cases of *Ludlow* and *Dale*,† and of *Goix* and *Low*,‡ I might well be excused from entering again upon the subject, unless, in the mean time, I had seen sufficient reason to change that opinion. The question has, indeed, been since presented in a way the most propitious to a liberal reconsideration of its merits. The authorities, and the principles they contain, have been examined at the bar *with a diligence and ability that have greatly aided our researches, and thrown light on the avenues to truth. It seems, then, in a degree due to the occasion, to the elaborate and anxious care which has been bestowed on the subject, that I should once more, but very briefly, and without recapitulating what I have before said, take some further notice of the argument.

† *January*, 1799.
‡ *April*, 1800.

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The true point in controversy is not what *ought* to be, but what in fact *was*, the legal effect of a foreign sentence of condemnation, in a case like the present, by the common

law, as understood and settled when our revolution began. I shall confine myself in this opinion, to the examination of this *single* point.

Let us first inquire what is the effect of a domestic judgment.

It is laid down as a general rule,† that whenever a matter comes to be tried in a collateral way, the final sentence of any court, having competent authority, is conclusive evidence of the matter so determined, in all other courts, having *concurrent* jurisdiction; for, it were very absurd that the law should give a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof.

† *Buller's N. P.* 244, 245. *Amb.* 761. *Freeman*, 84. *Str.* 733. *Harg. Law Tracts*, 465.469.

It has, however, been made a doubt by some,‡ whether such sentences upon jurisdictions, having concurrent authority, be conclusive, or only *prima facie* evidence of the fact, although I think the better opinion is in favour of their conclusive effect.

‡ *Harg.* 477. 3 *Mod.* 231.

But if a matter belongs to the jurisdiction of one court so *peculiarly* as that other courts can only take conusance of the same subject indirectly and incidentally, the rule is then more extensive and *unequivocal.† The latter courts are bound by the sentence of the former, until it be reversed, although it be in a suit *in diverso intuitu*, if it be directly determined, and must give credit to it universally, and without exception.

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† *Hargrave's Law Tracts*, 452. 457. 470. 477.

This rule has been illustrated in the case of sentences in the ecclesiastical courts touching marriages and wills; in the exchequer touching the condemnation of forfeited goods; and in the admiralty touching prizes, and in all of which cases, those courts have exclusive jurisdiction.

In respect to the ecclesiastical courts, the authorities are numerous, and have spoke a uniform language from the time of Lord *Coke* to the present day. In two cases, to be found in his reports,‡ the judges determined that they were bound (although it was even against the reason of the law) to give faith and credit to the sentences of the ecclesiastical courts, for *cuilibet in sua arte perito est credendum;*

‡ 4 *Co.* 29. a. 7 *Co.* 43. b.

and that, if the ecclesiastical judge showeth cause of his sentence, yet, forasmuch as he is judge of the original matter, they shall never examine the cause whether it be true or not.

All the subsequent cases say the same thing.†

This conclusive effect of the sentences of the spiritual courts applies to *strangers* as well as to parties and privies. They are conclusive evidence of the fact against all the world.‡ In one of the cases from *Coke*,§ and in the case of *Hatfield* and *Hatfield*,¶ which was finally determined on appeal in the house of lords, in 1725, the sentence was held binding on strangers. In a case before Lord *Hardwicke*, and in a case before Chief Justice *Willes*,†† strangers were *allowed to use the sentence against those who were parties.

The same doctrine is established in respect to condemnations in the exchequer. This fully appears from the case of *Scott* and *Shearman*,† in which it was held by Mr. Justice *Blackstone*, in a very elaborate argument, and in which all the court concurred, that the condemnation in the exchequer was conclusive; not only *in rem* but *in personam;* not only in the property vested in the crown, but as to every other collateral remedy; not only as to the party to the suit but as to the right owner, although no party, and against all the world. The seizure itself was held to be notice to the owner.‡ The law gives implicit credit to the judgments of competent courts, and it was afterwards observed by Chief Justice *De Grey*, that the decision in that cause had been the uniform law for above a century.§

It seems to be every where taken for granted, that the sentences of admiralty courts are equally final.¶

The rule, then, I have mentioned in respect to domestic judgments, has received all the sanction that a continued train of decisions can possibly give it.

We are next to see whether the same rule, as appearing to be directed by the same reason, has not been applied with equal uniformity to foreign judgments.

† 2 *Lev.* 14. 1 *Freeman*, 83. *Carth.* 225. 1 *Salk.* 290. *Skin.* 493. *Str.* 960. 961. *Amb.* 761. *Harg. Law Tracts*, from 452 to 479.

‡ *Harg.* 457. 471. *Bul. N. P.* 245.

§ 4 *Co.* 29. a.

¶ *Str.* 691. 3 *Bro. P. C.* 62. *S. C.*

†† *Str.* 690. *Amb.* 763.

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† 2 *Black. Rep.* 977.

‡ This law, as to *notice*, confirmed, 4 *Durnf.* 191.

§ 2 *Black. Rep.* 1176.

¶ 1 *Show.* 6. 3 *Mod.* 195. *note Harg.* 467. 2 *Ld. Raym.* 893. 1 *do.* 724. *Comyn's Dig. tit. Admiralty, E.* 17.

The most ancient case to be met with in the *English* books, is the case of *Hughes* and *Cornelius*.† Although the special verdict in that case falsified the sentence of condemnation in the *French* admiralty, yet the court admitted the sentence to be true; and although the suit was trover, in which, nothing but *the direct effect of the sentence came necessarily into view, yet the court, in giving judgment, laid down this general doctrine, applicable equally to collateral effects, viz. That they ought to give credit to foreign sentences of admiralty, and take them to be according to right, and not to examine their proceedings; that this was agreeable to the *law of nations*, and sentences in courts of admiralty ought to bind generally according to that law; that if the party was aggrieved he ought to petition the king, it being a matter of government, and if there appear cause, he will instruct his liege ambassador, and on failure of redress, will grant letters of reprisal.

† *Raym.* 473. 2 *Show.* 242. *Skinner*, 59. *S. C.*

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This decision, and the principle contained in the judgment, were afterwards cited and sanctioned by Lord *Holt*, and again by Lord *Hardwicke*, and, lastly, by professor *Wooddeson*, in the course of his Vinerian lectures.‡

‡ *Carth.* 32. 1 *Atk.* 49. 2 *Woodd.* 456.

A similar doctrine has been repeatedly advanced, and whenever the occasion arose. Instances of this are to be met with in the successive decisions of the chancellors, *Nottingham*, *King* and *Hardwicke*.§

§ 1 *Vern.* 21. 2 *Str.* 783. 1 *Vesey*, 159.

In the case of *Gage* and *Bulkeley*,¶ before Lord *Hardwicke*, Sir *D. Ryder*, who was then attorney-general, laid down the rule in its fullest latitude, and as being well established. He said that foreign judgments were received in *England* as conclusive evidence, and had the same regard paid to them, for the sake of justice and public convenience, as sentences given in the courts of admiralty or ecclesiastical courts at home; and he cited the case of *Hamden* and *The East-India Company*, which was determined upon appeal in the house of lords, and on the *ground, that the sentence of a *Dutch* admiralty was conclusive evidence, it being *res judicata*, and could not be unravelled or re-ex-

¶ *Ridgeway*, 266, 267.

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amined. Although what he said was merely *arguendo*, yet, coming from such an eminent counsel, and appearing to be taken for granted by the court, it is pretty good evidence of the prevailing sense on the subject.

Here we may also notice the answer of the judges (of which Sir *D. Ryder* was one) to the *Prussian* memorial, as being a document of very high authority, and bearing on the question before us.† It is there stated, that prize courts proceed contrary to the law of nations; that in every country there is a court of review, to which the parties who think themselves aggrieved, may appeal; that if no appeal be offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and is conclusive; that captures have been immemorially judged of in that way in every country of *Europe*, and with the approbation of the powers at peace; that every other method of trial would be impracticable and unjust, and that, if prize courts proceed contrary to the law of nations, and treaties *in re minime dubia*, then, and not till then, the neutral has a right to complain.

† 1 *Col. Jurid.* 101, 102, 106.

This answer, and the principle contained in the case of *Hughes* and *Cornelius*, may be considered as a correct commentary on the law of nations, relative to the effect which judicial sentences in one country are to receive in the courts of another.‡

After such a repeated and general recognition of the principle, we are prepared to expect an application of it (for that is all that is now wanted) to the case precisely the same with the one before the court. *We do, accordingly, find it stated as law, in *Buller's Nisi Prius*,§ that in an action upon a policy of insurance, with a warranty that the ship was *Swedish*, the sentence of a *French* admiralty court, condemning the ship as *English* property, was held conclusive evidence. The same case was previously stated in the *Theory of Evidence*,¶ to have been decided, and *Park* gives us a particular report of another decision of the like kind, before Lord *Mansfield*, at the sittings after *Hilary* term, 4

‡ *Grotius*, *l.* 3. *c.* 2. *sec.* 5. *Vatt. l.* 2. *sec.* 84, 85. *Martens*, 104. 105. *Erskine's Institutes*, *vol.* 2. 735.

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§ *P.* 244.

¶ *P.* 37. This book was published in 1761.

Geo. III. in the case of *Fernandez* and *Da Costa*. A ship was insured, and warranted a *Portuguese*; she was libelled and condemned in a *French* court as not being *Portuguese*, and although the plaintiff gave partial evidence of her being *Portuguese*, yet, when the defendant produced the sentence, it concluded the cause.

Where then can we discover a doubt, as to what was the law at the time of our revolution? Upon what ground can we pause even to raise a conjecture, that the court of king's bench, in the case of *Bernardi* and *Motteux*,† (being the first case after the year 1776,) created a new rule, when even the counsel for the plaintiff, at the very outset of the argument, admitted, that if the sentence of the *French* admiralty had proceeded on the ground of the property not being neutral, the plaintiff would have been concluded.

† *Doug.* 575.

Nor do I think the *English* decisions, since the year 1776, are to be thrown *wholly* out of view, although they are confessedly of no binding authority.

In addition to the consideration of the well known character of their judges, we are to observe that their *tribunals and ours, study and pursue the same code of law and equity, and they certainly are not more liable than we ourselves, to misapprehend the authentic records and oracles of the common law. If the question, therefore, were otherwise involved *in doubt*, a series of uniform decisions in the *English* courts, for the last twenty years, cannot but be considered, and that too, without being unduly addicted *jurare in verba magistri*, as a very sufficient cause to remove it.‡

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‡ *Doug.* 575. 610 614 *to* 617. 705. *Barzillay* v. *Lewis*, *De Souza* v. *Ewer*, and *Salucci* v. *Woodmason*, cited by *Park*, 7 *Durnf.* 525, 681, 705. 8 *Durnf.* 196, 232.

Having thus ascertained, at least to my satisfaction, that by the law, as it stood in 1776, a sentence of condemnation abroad, on the direct point in question, is, in a collateral suit by the insurer, conclusive evidence of a breach of his warranty, so that no evidence can be admitted to impeach it, I have done all that I undertook to do. I might here rest the argument. Whatever opinion may be entertained as to the justice or policy of the rule, is not to the purpose. Our duty is, *jus dicere, non jus dare*. I may be mistaken,

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but it appears, however to me, that all the reasons which have established the rule, relative to domestic courts, having exclusive jurisdiction of a subject, apply with *peculiar force* to a case like the present.

Courts of law are inadequate to determine the question of prize, and to overhaul the sentence is in reality trying the question. The circumstances that go to constitute prize, are oftentimes complex. The property may be deeply masked, the papers double, or every requisite paper may be regular, and yet the conduct of the master such as to cause the property to *lose* its privilege of neutrality. * 266 None but *a court clothed with the mode of proof, the summary powers, the enlarged discretion of a prize court, can seize and sift every circumstance. The maritime law of *Europe* has, therefore, very wisely established a peculiar court, for the exclusive jurisdiction of prize. It is there that the assured should vindicate his property, and if aggrieved, he should carry his appeal to a court of review. There is great weight in the observation, that this is the true construction of the engagement, on the part of the assured. By representing, or warranting his property to be neutral, the assured undertakes, not only that it is so in *fact*, but that it shall be *entitled* to neutral privilege, *throughout the voyage*.† To construe the engagement to be *less* than that, is in a great degree to render it idle and nugatory. "To implement this warranty," says a very sensible writer on insurance, (*Millar*, p. 496.) "the ship or goods must be neutral *in conception of that nation from whom danger of seizure is apprehended*." On such a representation or warranty, the insurer lays out of view the risk of loss, by reason of the non-neutrality of the property. That risk the assured takes upon himself, and having in his hands, exclusively, all the *means* to do it, he is bound to make good his *averment*, whenever, and wherever the neutrality of the property, or its privilege as such, is called in question. If he fails to do it, he must bear the loss, and if foreign sentences were liable to be re-exami-

† 8 *Durnf.* 234. 444. A *warranty* of neutrality, means that the ship shall maintain a neutral conduct and not forfeit it during the voyage.

ned here, I should still incline to think that in the case of an *express warranty*, the assured, and not the insurer, takes upon him the risk of the condemnation, *right or wrong*. Whether that would or would not be the *case, on a *representation* merely, I am not as yet prepared to say, and, therefore, in those suits, where there was no warranty, but only a representation, I should choose to rest my opinion entirely on the first ground, of the faith due to the foreign sentence.

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The result of my opinion accordingly is, that the plaintiff is not entitled to recover in this cause, beyond the return of his premium.

On the judgment rendered in conformity to the foregoing opinions, the now plaintiff *Vandenheuvel* brought his writ of error, insisting that the judgment was erroneous;

1. Because there was no warranty in the policy, and, therefore, the defendants assumed every possible risk.

2. Because the order for insurance, if it amounted to a representation, must have been understood by both parties merely as a representation that the property belonged to the plaintiff, not that it was neutral or *American*.

3. Because the sentence of condemnation does not negative the representation; and,

4. Because, if the representation amounted to an explicit warranty of the neutrality of the property, the jury have found it to be true, and the sentence ought not to be received as evidence to the contrary.

1. We say, there being no warranty in the policy, the underwriter took upon himself every hazard, and particularly those arising from the character and quality of the property.

The policy on record contains nothing like a warranty of any kind. Mr. *Vandenheuvel* is not styled a *citizen of the *United States;* nor is there an expression in it which can be tortured into an intimation of the country or community to which he belonged; he had no doubt heard how extremely jealous our courts were of foreigners assuming the name of *American;* he also knew, probably by woful experience,

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that many of the *West-India* judges, those oracles of modern law, were also of opinon that a *Dutchman* had no right to expatriate, even for the purposes of commerce; it may likewise have come to his ears, although he must have been endued with more than common intellect to comprehend its meaning, that a foreign sentence, silent as the tomb, would proclaim in loud, unequivocal and conclusive terms, that *he was no American*. With all this information, well calculated to inspire apprehension and caution, he makes the present insur ance. For a moment, he is tempted to save a part of the premium, and warrant his property neutral: He has resided in *New-York* more than five years; his certificate of naturalization bears testimony of his citizenship; the property he knows to be his own, and he is on the point of calling it *American* in the policy. This was true, and would have reduced the premium considerably: But, on further deliberation, he resolves to forego every benefit which his naturalization and neutral character gave him, and to pay a war premium without the embarrassment of a warranty. The policy is framed accordingly; not a letter in it purports a warranty of any kind. Was the instrument then to be our guide, as it ought to be, we should arrive at a correct decision without difficulty, and without opposition from a sentence more impregnable, if possible, than the invincible fortress whence it issued.

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*The policy being for the benefit of every one to *whom the property may appertain*, would cover not only his own goods, but even those of a belligerent merchant: "These words," says the learned *Emerigon*, "comprehend *Frenchmen*, as well as neutrals. The expression is general, and such should be its interpretation, especially in the present state of affairs, (*France* being then at war,) when it is clear that if the insurance had been intended for a neutral, it would have been so declared in *express terms*; the assurers, therefore, he continues, have no pretext for saying they were deceived." *Val. Ord. Mar.* v. 2. p. 120. The underwriters, in the case *Emerigon* is speaking of, complained that they had not been apprized of the property belong-

ing in part to *Frenchmen*. This author, not less celebrated for a pure and unblemished life, than for his professional labours and skill, evidently supposes no property in time of war should be deemed *neutral* unless *expressly so* stated in the policy. Some judges in this country have intimated an opinion, that all property in time of war must be taken as belonging to neutrals, unless otherwise called in the policy. Should this case come to the hands of any gentlemen who have fallen into this error, the mischiefs of which to our merchants surpass calculation, I beg them to peruse the author just cited. If his arguments, in which the vigour of a great mind, and the perspicuity of a man who fully understands himself, ever appear, are not followed by conviction, nothing I can say will be attended to. Mr. *Vandenheuvel*, neutral as he was, did not think it safe to pursue the advice of this great man, and describe himself and property as such. Whatever rights neutrals have had and maintained, Mr. *Vandenheuvel* *knew, that at this day, * 270
every such pretension is abandoned, and that citizens of this description are given up by the courts of their own nation to be buffeted and plundered by the worse than inquisitorial tribunals of the powers at war. In the same case it is mentioned that underwriters are bound to pay for an *unjust* capture; this is common sense, and therefore we must not be surprised to find that it was law in the days of *Emerigon*. But the plaintiff recollected, that in the present day a rage for improvement pervades every rank in society; that not only philosophers, but ministers of justice, were infected with the pernicious mania; that judges in *England*, with not more learning or industry than their predecessors, were innovating on their venerable institutions. He feared, perhaps, that the same spirit of refinement might extend to this side of the *Atlantic;* to be safe, therefore, in every possible event, he effects an open policy, unfettered with any warranty, stipulation or condition whatever. But even the caution and sagacity of a *Dutchman* cannot secure him: He unfortunately writes a letter, and although this

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forms no part of the contract, it is now produced in judgment against him; this weapon shall also be wrested from the hand of his adversary, and employed in his defence. If the policy contains not internal and satisfactory evidence, that no neutrality was to be warranted, such intention results most irresistibly from this very letter, or order for insurance: This we say,

2. Amounted only to a representation that the property *belonged to Mr. Vandenheuvel*, not that it was *American*.

1. From the express terms of the order.

2. From the course of the transaction.

* 271 *The distinction here relied on between calling the property *his own*, and calling it *American*, is important, in case this abominably wicked *Gibraltar* sentence is to be enforced against him. He will therefore be permitted to show not only that a distinction exists, but was intended and understood.

The representation is that the premises insured were the *property of John C. Vandenheuvel*. This, say the underwriters, and the supreme court, is equivalent to calling the property *American*. Whence is this inference drawn? Not from the name; this is most unequivocally *Dutch;* not from the place of his nativity; this it is admitted was in the *United Netherlands;* nor from his looks, every underwriter at first sight would pronounce him a foreigner; nor from his speech, for although he speaks *English* very well, the accent of his mother country is perceptible in every sentence; *nor* could it be presumed from his residence in *New-York;* this the supreme court have said, in the case of *Campagne* v. *Deyne*, is not worth a rush. Still less was it to be collected from his naturalization; this Judge *Kellsall* has pronounced, in the case of poor *Duguet*, (and his sentence has also been affirmed,) a sin against his natural allegiance, and a violation of the rights of the belligerent parties. The truth is, Mr. *Vandenheuvel* did not choose to say whether he was a subject of the emperor of *Morocco*, a citizen of the *Batavian*

republic, or a sachem of the *Tuscarora* tribe of *Indians*. This they they were to guess at as well as they could. He knew that foreign admiralties were in the habit of metamorphosing the national character of a merchant *ad libitum;* but he had never heard of their undertaking to change the name of an owner. He was not afraid, therefore, of their *saying * 272
that the property did not belong to *him*. To this he knew the papers and testimony would give the lie direct. He only apprehended their calling him a *Spaniard*, a *Dutchman*, or a *Turk*, as the interest of the moment might dictate. He therefore contented himself with saying that the cargo belonged to *himself*. The light in which he might be received abroad, was left at the risk of the underwriters. It requires uncommon ingenuity, according to *our* doctrine, (for in respect to naturalized or resident citizens, the *English* courts are infinitely more liberal than the supreme court,) to ascertain Mr. *Vandenheuvel's* national character. His ancestors must have been subjects to *Philip* king of *Spain*. Those who maintain the divine and hereditary right of kings, and the perpetual and indefeasible obligation of natural allegiance, may style his ancestors rebels, and himself a *Spaniard;* others may call him a *Dutchman*, because he was born a subject of the prince of *Orange*, or as the stadtholder has expatriated, (which by the by, he had no right to do, according to the modern law of nations,) they may think him a citizen of the *Batavian* republic. Others, again, considering his oath of allegiance to this country, his residence and naturalization, may be disposed to think, in opposition to the supreme court, that he is really and truly a citizen of the *United States*. This, it must be confessed, is a knotty point, and must be left *exclusively* to the decision of an admiralty judge. But with such various pretensions why should the underwriters take him for an *American?* They had no more right, from what passed, to consider him a citizen of this country, than Judge *Morrison* had to pronounce him a *Spaniard*.

*3. From the nature of the transaction. * 273

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During a war, underwriters ever distinguish between enemy and neutral property: For the former they have a higher premium, and the policy is against all risks. In the latter case, as the premium is much lower, they take care to have the neutrality of the property stated in the policy. When this is omitted, the presumption is fair, that they regard the property as *enemy*, and receive a premium accordingly. Not an instance has occurred this war, wherein an underwriter meant to insure neutral property, *as such*, without its being expressly so declared in the policy. If, in this instance, the contract had been intended to be of that kind, most certainly they would have taken care the policy should speak for itself. They would not have trusted to a slip of paper, which, by the negligence of a broker, or other casualty, might be lost or destroyed.

Again, great injustice will be done to Mr. *Vandenheuvel* by the construction attempted to be put on this contract. It is become a general practice with merchants, who warrant their property neutral, to provide, by a proper clause, that a foreign sentence shall not preclude other proof. This would have been done here, if either party had supposed the goods *American*. From this benefit, the plaintiff will be precluded, and that by the negligence of the defendants, who should have insisted on this stipulation, if they intended, at a future day, to avail themselves of it. Their not making this a part of the contract is a clear proof that they did not underwrite the property as neutral, and received a premium accordingly.

If our interpretation of the order, which leaves no room for construction, be just, it follows,

* 274 *4. That the sentence of condemnation is not at variance with the representation.

"The property is condemned as belonging to *Spain*, or to persons being subjects of the king of *Spain*, or inhabiting within the territories of the king of *Spain*, enemies to the king of *Great Britain*."

Mr. *Vandenheuvel* has not said he was not a subject of the king of *Spain;* a person may, by swearing allegiance to different sovereigns, become the subject of several countries. We have many *British* subjects among us who are *American* citizens, but who would be treated as traitors by the mother country, if taken in arms against it. So that, for aught that appears, the plaintiff may have sworn allegiance to the king of *Spain*, and yet the property may fall within the letter of his representation, which only declares it to be his own. It is admitted he was born in *Holland*, and the *British* courts of admiralty, if they govern themselves by the decisions of our supreme court, would have confiscated it, although he had produced his letter of naturalization. It was, no doubt, to guard against this very event, that he cautiously avoided declaring to what country he belonged. He knew he was an *American* citizen, but he could not tell that foreign courts would consider him as such.

The cargo was too valuable, not to have brought his case within some of the new-fangled principles, which have lately been adopted to reach neutral property. He knew, also, that by the law of nations, and by that of *England*, he was entitled, for every purpose of trade, to be regarded as an *American;* but he as well knew, that boards of admiralty respected *no law. He was determined, therefore, not to * 275
expose himself to any embarrassment that might arise from the iniquity of their proceedings, or to put it in the power of the underwriters to avail themselves of any sentence they might pronounce. He could not, however, foresee the length which the supreme court would go in giving effect to such sentence. He little imagined, that presumption on presumption would be raised to defeat his recovery.

1st. It is presumed that he is an *American* citizen. This is in direct contradiction to the decision in the case of *Duguet*. Then it is presumed he meant to warrant the property *American*, although nothing of the kind appears in the policy. Next it is presumed he meant to represent it as such, although the order for insurance conveys a meaning

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totally different. Then it is presumed, the property was not *American;* because the judge, appointed specially for the purpose of condemning neutral property, has said it belonged to *Spanish* subjects. Lastly, it is presumed not to belong to Mr. *Vandenheuvel*, although his name does not appear in the decree. There must be some uncommon sanctity in these decrees, where so much pains, and such forced constructions, are resorted to for their support.

But if all these presumptions must be made in a case where every honest feeling must take part with the assured, we say;

5. That the jury having, by their verdict, verified the truth of his representation, the sentence cannot be received as evidence to the contrary.

That a sentence abroad, ought, in no instance, to conclude the assured, was shown in the case of *Goix* *v. *Low*, which is now before this court. Referring to that argument, we shall only insist, that there is a real and acknowledged distinction between a representation and a warranty; and that among all the unintelligible and contradictory *British* cases, *not a single* decision is to be found, in which this outrageous principle has been applied to the case of a representation.

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If such sentences are conclusive against one representation, why not against another? In that case where are we to stop? Representations are infinitely more diversified than warranties. One man in his instructions to insure, calls his vessel a *ship;* she is condemned, because she is a *brig;* Another says, the crew are all *New-Yorkers;* she is sentenced, because one of them *was born in Boston.* A third says his vessel is an unarmed merchantman; she, too, falls a prey; and without a particle of proof, it is stated by his honour, that she was armed with thirty-six guns, *all twenty-four pounders.* This, too, must be conclusive; for, although the vessel insured should appear to be an *Albany* sloop of only fifty tons, our courts would be compelled to believe, that by some miracle, she had strength enough to

carry guns of that caliber, and would think it very disrespectful in the owner, to hint at the impossibility of the thing.

A merchant will soon find it difficult to write an order for insurance; he will hardly dare to open his lips. If he tells the truth, and has a hundred witnesses to attest to it, it may, by and by, be contradicted by a judge, of whose existence he had never heard, or who may be one of the herd that infest *the *West-India* islands. He will be compelled to be silent, or the most he will dare to say to the broker will be, "tell the assurers the name of the vessel, and the voyage; pay whatever premium they ask; answer no questions; say not that the vessel is painted white or black; that she has two or three masts; that she is armed or unarmed. If they suspect the property belongs to the *French* consul or the Grand Seignior, and therefore demand a higher premium, do not undeceive them; pay at once the additional sum they ask. I know I am a native *American*, and that the property is mine; but rather than give a hint of the kind, which will be twisted into a warranty or representation, I will submit to pay five or six thousand dollars more, and have no trouble about it."

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Thus will every *American* be driven to carry on trade as a belligerent subject, to avoid becoming a victim of the fascinating doctrine, that admiralty judges can do no wrong; and that their righteous decrees are to bind all mankind, from the rising of the sun to where he goeth down. The decisions of *Sancho*, while governor of *Baratraria*, notwithstanding the sagacity which the squire discovered, and the high reputation in which they have hitherto been held, must now, like every thing human, pass away. His judgments were the result of common sense and common honesty, (for luckily for his subjects, he knew nothing of the law of nations,) but they bound only the inhabitants of a small island; the *West-India* sentences on the contrary, pervade the globe, and proceed on the eternal and immutable laws of God and of nature, which no

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earthly consideration *would have tempted Judge *Morrison* to violate. What a pity it is, that his honour did not disclose to us the grouds of condemnation. The truth is, there was found on board a letter in cypher, from the *French* consul at *New-York:* It was this innocent epistle which occasioned the forfeiture of a most valuable property: And yet this decree, this offspring of darkness and oppression, this outrage on neutral rights, this satire on justice, must be received as conclusive evidence that the property belonged to the king of *Spain*, who, it seems, has lately become a merchant, although the very judge who pronounced it, must have been satisfied, from the documents before him, that the ship and cargo actually and entirely belonged to the plaintiff.

There being neither a warranty, nor representation, as to the property's *neutrality* in this case, it must be superfluous minutely to examine how a foreign sentence should be treated in this country. I shall therefore only subjoin a summary of the reasons why, even in case of express warranty, a sentence should be conclusive of nothing, except that the property was actually condemned, and that, therefore, the assured was entitled to recover.

1. It is contrary to the written contract, and the true understanding of the parties. The high premium paid by neutrals during a war, is to be protected against *unjust judgments*. It is not within human ingenuity to assign another plausible reason, why neutral property should, in a war between other powers, be burthened with so great an addition of premium. Is it not then absurd and unjust to say, that by such a sentence, *the risk*, which was so much apprehended, *and the principal one intended to be guarded against, shall bar a recovery? Not all the art of man, or powers of the human mind, can reconcile this plain, obvious and true construction of the instrument, with the doctrine of a foreign sentence being conclusive.

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2. It is a capture at sea which gives to the assured a right to abandon. This being made, fixes the condition of

the parties. A subsequent judgment cannot alter or vary their rights. "If an abandonment be made, the *assurers*," says *Emerigon*, "are *alone* interested in the sentence which may be pronounced; and if the ship be declared good prize, contrary to the law of nations, or the laws of war, the underwriters must suffer by it. If the property be released, it belongs to them in virtue of the abandonment. But what fixes," says he, "the condition of the parties, considered in itself, is *not the judgment rendered by the tribunal* of a *foreign* and *hostile monarch*. It is the *abandonment*, made or not made; it is the *capture* that confers the *right* of abandoning." *See Valin*, v. 2. p. 122.

Here, in few words, without any affectation or display of learning, we have a just and correct construction of an important expression in the policy, a want of attention to which has occasioned all the confusion and absurdity of modern adjudications. It had not occurred to this profound lawyer, how an unjust sentence, which must necessarily be subsequent to a capture, could defeat the rights of the assured, which that event, followed by a timely abandonment, had rendered perfect and indefeasible; nor could his penetrating mind discover, how any question, arising *on a policy, could be influenced by proceedings which were carrying on, *in rem*, at many thousand leagues distance, and in the absence of all the parties: Still less could he perceive why the tribunals of his own country should forbear to inquire into the truth of a fact, which had probably never been agitated abroad. But no study or reflection could have brought him to comprehend why a court in *France* should not decide according to *facts admitted by both parties*, (as is the case here,) merely because a foreign tribunal had condemned the property as prize: He therefore considered the vessel, after capture and abandonment, lying entirely at the risk of the underwriters, and that the consequences of a condemnation, just, or unjust, must be borne by them. This, however, did not deprive the underwriters of any defence arising out of the peculiar quality of the property, or the

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misconduct, or misrepresentation of the assurers. Such questions frequently must have arisen: when they did, they were decided according to evidence, as in other cases, by the *French* courts, who saw no reasons for transferring to a petty tribunal, in the east or west, matters which they themselves were competent to determine, and respecting which they possessed full and complete information. Under this order of things, the assured contended on equal ground with his adversary; his witnesses were heard, his papers examined, and his character and reputation were not totally lost sight of. Under the new state of things, his reputation, his witnesses, the fairness of his conduct, and regularity of his papers, avail him nought: In short, he has no more chance of succeeding against an

* 281 underwriter, who is protected by an unjust *foreign sentence, than the property itself, perhaps a valuable *Indiaman*, had of being released from the gripe of a corrupt and rapacious admiralty judge.

3. If these sentences are received as conclusive, great injustice will most certainly, and invariably follow; which will be avoided, by permitting the assured to prove his warranty. This argument should exclude the reception of these sentences: by doing so, injustice may be done; in the other way, an improper decision is impossible.

4. These courts being governed, not by the law of nations, or of war, but by arbitrary mandates of their respective sovereigns, it is folly in the extreme, to pay any deference to their decrees.

5. If they were truly governed by general, fixed and known rules, their modes of proceeding are too unfriendly to truth, to receive their sentences as evidence of any fact whatever.

6. It is extremely difficult, and so allowed to be on all hands, even when the cause of condemnation appears, which is not often, to discover by what rule the judge has come to his conclusion; it is, therefore, not just to say, it *must have been* for this or the other reason.

7. It is impolitic to give any credence whatever to these decrees, except when it is attempted to disturb their *direct effects*.

8. By admitting the assured to prove his warranty, these sentences are neither opened or reviewed; a contrary supposition has been the source of much error on this subject.

Upon the whole, a case more to be favoured, never presented itself to a court; the plaintiff has *acted with good faith throughout; if he has really made any representation, as to the neutrality of his property, which he denies, the defendants admit he has said no more than what is true. He sees no reason, therefore, why he should not entertain sanguine hopes that this judgment will be reversed, and the underwriters compelled to pay the whole amount of their respective subscriptions. * 282

BROCKHOLST LIVINGSTON,
of counsel for the plaintiff in error.

The defendants in error insisted that the judgment ought to be affirmed, because,

1. The description of the good *American* ship is equivalent to a warranty of her as *American* property, by the plaintiff in error.

2. Because every warranty in a policy is deemed to be a condition that a certain thing shall be performed, and unless it be performed the contract is void. It is perfectly immaterial with what view the warranty is inserted; or whether it is inserted with any view at all; but being once inserted, it becomes a binding condition on the assured; and unless he can show that he has literally fulfilled it, the contract is the same as if it had never existed.

3. Because the sentence of the court of vice-admiralty, condemning the ship and her cargo as *Spanish* property, without assigning any reasons for the condemnation, is conclusive evidence that the ship was not *American* property. Hence it follows, that the plaintiff in error has failed in performing his warranty that the ship was *American* property,

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and, consequently, the plaintiff in error cannot be entitled to *recover a total loss; but is only entitled to recover a return of premium.

ROBERT TROUP,
of counsel for the defendants.

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On the cause being brought on, RADCLIFF and KENT, justices, assigned the reasons of the court, as *ante*, from page 243 to 267 inclusive.

CLINTON, Senator. The plaintiff having warranted a ship and cargo as *American* property, the question is, whether, in an action against the insurers, the sentence of a foreign court of admiralty, that such warranty was false, is conclusive evidence. It is admitted by the plaintiff, that the sentence binds and changes the property, and that it is *prima facie* evidence of the fact set up against him; and, on the other hand, it is conceded by the defendants, that in several cases, in an action of this kind, the judgment is not definitive in favour of the insurers; such as when, on the face of it, it is founded on local ordinances, or contrary to the law of nations, or so ambiguous that the court cannot, from the reasons assigned, collect the grounds of it; and, that this case not coming within either of these descriptions, the contest between the parties still remains open, whether the foreign sentence be *prima facie* or conclusive evidence, against the insured, and whether it bind the property adjudicated only, or is conclusive to every extent, and in every modification of the subject.

Upon a question of such immense importance, either as it respects the interests of commerce, the honour of the nation, the rights of individuals, or the principles of justice, great and mature deliberation is requisite and essential. I know not any cause *that has ever been discussed in this court, which embraces so many objects, to render the final result important. Attempts have been made to establish the doctrine of conclusiveness; and, as far as I can com-

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prehend them, they may be arranged under four general heads.

1st. Authorities, previous to the 19th *April*, 1775.

2d. Analogical reasoning from domestic courts.

3d. The nature and meaning of the contract of insurance; and,

4th. National considerations of courtesy, comity, and the like.

The cases quoted, as existing anterior to the revolution, are not only few, but are either ambiguous or not in point.

The most ancient one, reported in 2 *Shower*, of *Hughes* v. *Cornelius*, was an action of trover, brought for a ship sold under a decree of a *French* admiralty court. The court admitted the sentence to be true, although contrary to the special verdict. They went upon the ground of the decree's changing the property, and of the inconveniences that would result to merchants, if the court should unravel the title of property acquired in this way; and the reason assigned by Chief Justice *M'Kean*, in a case reported in *Dallas*, seems to be conclusive. The idea that a sentence of a court of admiralty is conclusive, arises from this consideration, that the court always proceeds *in rem*. The decree naturally and necessarily binds the subject of the proceeding. A ship or cargo, or any person purchasing under the decree, will, of course, be secure.

The next case relied upon, is a supposed one of *a *Swedish* ship. It was first mentioned by an anonymous author, in a book entitled "*Theory of Evidence.*" It does not appear in any collection of reports; and *Buller*, in referring to his authority for this, mentions in the margin, the case in *Shower*. It therefore appears, that it is confounded with the case of the *Dutch* ship in that author. * 285

The case of *Fernandez* and *Da Costa*, was a *Nisi Prius* one, and it expressly states, that the plaintiff only gave a partial evidence of the vessel's being *Portuguese;* and all we can collect from it, is, that the testimony adduced by him was not sufficient to balance that derived from the fo-

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reign adjudication. Will it be believed, that upon this slender ground, the mighty fabric of conclusiveness is attempted to be erected? For, independent of decisions since the revolution, which are no authority; of arguments from analogy, which I shall presently notice; and of a few scattered *dicta* in the books, which do not bear the stamp of judicial authority; there is nothing whereby to warrant the decision of the court below.

The arguments derived from the deference which is paid by the courts of *England* to each other's proceedings do not apply. They are parts of the same building held together by one common arch. They are under the same government, proceed according to the same law, and redress can be obtained through higher tribunals. If they attempt to exceed their jurisdiction, they can be restrained by a superior power, which has an interest in preventing any undue encroachments, and repressing any improper deviations. This is not the case with a foreign court of admiralty. If a neutral conceives himself injured, and is indulged with an appeal, he must still continue *in the courts of the belligerent; and there is not any uniform law by which these courts govern themselves. They listen more to instructions from the sovereign, than to the injunctions of the law of nations. Lord *Mansfield* admits, that, "in every war, the belligerent powers make particular regulations for themselves; and that no nation is obliged to be bound by them. (*Park*, 360.) It is conceded by the defendants that a foreign sentence is not binding if resting, on the face of it, on such regulations, and yet they declare, that if founded on these, but it does not appear to be so founded, that then it is conclusive.

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With respect to the nature of the contract, upon which much has been said, I confess I do not perceive the force of the reasoning, which attempts to fix the loss on the insured.

The contract of insurance, says *Park*, being for the benefit of the insured, and the advancement of trade, must

be construed liberally for the attainment of those ends. We must, therefore, not give it an exposition that would tend to embarrass commerce, or injure the assured; but adopt such a construction as will most promote the important objects in view. How commerce would be affected, shall hereafter be considered. By the terms of the contract, the assured warrants the property to be neutral, and it is understood to be incumbent on him, so to conduct the vessel, as not to forfeit her neutrality. If the vessel be neutral, in fact, he fulfils his warranty. He does not warrant that she shall be so in the conception of foreign courts. It is not in the reach of human sagacity, to scan the views which different men may take of the same subject, or the various motives which may produce clashing decisions. *Against corruption or ignorance in judges, perjury in witnesses, and fraud in captors, it is out of the power of the assured to guard; they are risks which he casts upon the assurer, and which the assurer undertakes, in consideration of an adequate premium. All the assured is required to do, is not to falsify his warranty. In this case, he paid a war premium of 15 *per cent.* and, the foreign sentence out of view, the special verdict has verified his warranty.

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With regard to the comity due from one national tribunal to another, it appears to me that the compliment is carried sufficiently far, by considering the sentence as *prima facie* evidence. We are not bound to sacrifice the substantial interests of our citizens to etiquette or courtesy. If a foreign nation will countenance unjust spoliations, if a foreign judge will divide the spoil with the plunderer, are we to countenance the knave and the robber, and declare, with all possible politeness, although we are convinced that an inquiry would paint you in these colours, yet, our respect for your authority will prevail over a regard for justice, or the claims of our citizens; we shall silence all discussion; and, although we know you to be both ignorant and corrupt, both oppressive and fraudulent, yet, as you wear the form,

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without attending to the obligations, of a court of justice, we shall treat your decisions with all imaginable courtesy, comity, deference, politeness, and respect.

This is a summary of the doctrine, stripped of the imposing garb which it has assumed; and it can only be a question, whether it is most deserving of ridicule or detestation.

* 288 *In suits, brought in *England*, upon foreign judgments, between the same parties, the courts consider them only as *prima facie* evidence of the demand, and admit the defendant on a plea of *nil debet*, to contest the merits of the original cause or action. If a foreign judgment be not considered conclusive between the same parties, in cases of this nature, why of a foreign court of admiralty between third persons? The constitution of the *United States* provides, that "full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings of every other state." And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof. Is it conceivable, that if the sentence of courts of disconnected nations are to be held in such high veneration, by each other, that the framers of the constitution could have thought it necessary to make this provision for sister states, in the closest bond of political connexion. The *British* have made the interests of commerce a primary object of their cares. In the discovery and arrangement of wise plans, and the execution of efficacious measures, for the attainment of this important end, they stand unrivalled in the history of mankind. Their fleets now traverse every clime, and visit every sea, laden with the riches of the world; they bear in their hands the trident of the ocean. In the time of war, they enrich themselves with the plunder of neutrals; their courts appear every where, and condemnations are conducted, not according to the law of nations, or the rights of parties, but according to the instructions from the

* 289 sovereign *and the rapacity of the captors. "Much less,"

says *Wooddeson*, "ought any of our courts to slight a foreign sentence. Unless we give credit to their proceedings, we cannot expect the judgments here should be thought to merit from them any reverence or attention." Here, then, is an explicit avowal that the doctrine is adopted with a view to a return. But *France*, having a different policy, has adopted a different system.† It is to be further considered, that *Great Britain* is more than one half her time at war; that she is an underwriting nation, and, therefore, highly interested in maintaining the rule laid down. Our policy is entirely different. Peace is no less our interest than our duty. Our courts are not liable to executive instructions, and, consequently, must go by the principles of justice; not according to the exigencies of the state. In establishing, therefore, a rule for our government, on this momentous subject, *argumenta ab inconvenienti* ought to have great weight. *France* and *England* have set us the example; and, as the law of nations is, at least, doubtful, we are at liberty to adopt such a construction as shall most subserve the solid interests of this growing country. We ought, also, to consider, that the object of insurance is indemnity; that instead of fixing the loss upon one, it divides it among many; that with a pacific nation like ours, an exposition that will release the insurer from war risks, will be a deprivation of all the benefits that can arise from a neutral position, and will expose us to most of the calamities, without any of the advantages, derivable from a belligerent state.

† *Emerigon*, 457. 464. and admitted in the argument of Judge *Radcliff*.

Even *Great Britain*, situated as she is, has found inconvenience, in many respects, from the generality *of the rule she has adopted. Her courts have, by recent decisions, attempted to narrow it into a smaller compass. Several important exceptions have been sanctioned, and whenever a different course of policy shall be deemed advisable, the whole system will be destroyed. Our court has, unadvisedly, and, in the first instance, without hearing argument, taken that direction, and with the best intentions, has persevered in a doctrine, which would inevitably lead to the

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spoliation of our citizens, and the destruction of our commerce.

There is nothing, either in the constitution of the admiralty courts of *European* nations, or the mode of proceeding in them, which entitle them to respect. They adopt the rules of the civil law. The judges hold their offices during pleasure, and follow the instructions of the ministry. The captors, who are interested, are admitted as witnesses, and the judges are paid in proportion to the condemnations. They are generally composed of needy adventurers; their great aim is plunder, and their primary incentive, avarice.

I have thus, in a cursory manner, glanced at the principal grounds of reasoning in the cause, and I must own, that I feel most deeply impressed with its importance. The effects of the decisions of this day will be felt when we are no more; and I trust that it will receive the approving voice of our consciences, and of our country.

GOLD, Senator. The questions that arise in this cause for the consideration of the court, are:

1st. Does the warranty in the terms of the *good American ship, the Astrea*, import, in judgment of law, *American, or neutral property?*

* 291 *2d. Is the sentence of the vice-admiralty of *Gibraltar conclusive, and does it repel the verification of warranty here?*

On the first preliminary question, however loose and indefinite men are in conversation upon subjects of this nature, yet, when the *occasion* is considered, the bearing of the *property of the ship* on the professed object of the contract; its materiality to the risk, and consequent propriety of an understanding on the point; the court must, I apprehend, consider Mr. *Vandenheuvel* as explaining himself on the question of property, and under the terms *American ship*, warranting it *neutral.*

Such, in my apprehension, is the plain, fair and rational import of the language used by the assured on this occasion.

On the second question in the cause, involving the legal effect of the sentences of foreign admiralties, I enter with much diffidence, and all the solicitude which its extensive operation upon the fortunes of our fellow-citizens, and the jurisprudence of our country, inspires. If our law is settled on this point; if the question is bound by authority, then law must have its course, however unpleasant the consequences, however opposed to the speculations of the most enlightened statesmen.

For authority on the question, adjudged cases in that country from whence our jurisprudence is derived antecedently to our revolution, must be resorted to.

The necessary effect of the sentences of foreign admiralties *in rem*, in changing the property in the subject matter in case of condemnation, is readily *evinced both in point of reason and authority. To this the case of *Hughes* v. *Cornelius*, 2 *Shower*, 232. strengthened by some other cases, bears strong testimony; in this the jurisdiction of all admiralties, and the peace of all civilized nations, are essentially concerned. * 292

But the reason for extending those sentences beyond the attainments of the above objects, to control the stipulations of parties in a policy of insurance are not equally cogent; the necessity not equally apparent.

For authority to support this application of admiralty sentences is cited, *Buller's N. P.* 244. *Theory of Evidence*, 37. and the case of *Fernandez* v. *Da Costa*, *Park*, 177. In the two first books, the rule to the above extent is laid down in nearly the same words, in plain and unequivocal terms; but no case is cited in the *Theory of Evidence*, in support of the doctrine, and in *Buller*, the case relied on is that of *Hughes* v. *Cornelius*; which, although containing observations of the court of a very general and unqualified nature, yet, in the point adjudged, does not warrant the rule as there laid down.

The case of *Fernandez* v. *Da Costa* is apposite to the question before the court, and merits all that respect which

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is due to a *Nisi Prius* decision of one of the greatest judges that ever sat in *Westminster Hall.* The name of Judge *Buller* must be considered also as adding some authority to the rule by him laid down, though supported by no adjudged case there cited.

No adjudications at bar, no elaborate discussions appear to have taken place on the question. On this foundation, in
* 293 point of authority, stands the doctrine *contended for by the defendants in error; and we are now called upon to say, whether the question is so bound down by authority as to be deemed at rest, and to repel a consideration of its merits.

After much reflection on the point, in every view I have been able to place it, I am not satisfied that the law on the subject was settled at the period of our revolution. In pursuing the history of law principles, in retracing adjudications, and collecting cases upon questions long agitated in courts, we find early cases often overruled; first opinions disregarded and reversed, and important questions finally settled in opposition to greater authority of precedent than what is to be found on the question before the court.

Such is the result presented by a perusal of *English* reporters.

But general principles are resorted to in support of the definitive effect of admiralty sentences, and domestic judgments are adduced for illustration.

In the principles of sovereignty, in the superior integrity and responsibility of domestic judges, their exemption from the influence of policy, from the dominion of passions hostile to the administration of justice, too often excited in belligerent nations, in the prevalence of the salutary maxim of municipal origin, "*ut sit finis litium*" will be found reasons, I apprehend, for superior confidence in domestic tribunals.

The case of *Walker* v. *Witter*, *Doug. 5.* is strong to show the difference between domestic and foreign judgments; the incontrollable verity predicated of the former, is with-

held from the latter, which are there holden to be *examinable*. Nor is the effect *of this authority repelled by the argument, that a court resorted to, to carry into effect a foreign judgment, ought to be satisfied of its justice; the application is for *justice* and not *favour*, and the court thus resorted to is bound by constitutional principles, not to delay that justice; besides, the same principle will apply to the case before the court.

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The case of *Gage* v. *Bulkely*, in *Ridgeway*, and *Burrows* v. *Jemimo*, in *Strange*, are not considered as bearing on the question; they resting on a different principle, that of the "*lex loci contractus*." The qualified manner in which admiralty sentences are now received in *England;* their different operation as to the *fact* and the *law*, serve to mark a wide distinction between those sentences, and domestic judgments.

If the reasons assigned for an admiralty decision, do not, when tested by the law of nations, bear out the conclusion, the sentence is rejected; if the reasons are assigned in an obscure and unintelligible manner as to the *point decided*, the result is the same; but if the judge should have no reasons, or, by casualty, omit to put them on the record, then the sentence becomes conclusive, and repels all examination.

Why a sentence founded on *error, as to facts*, should be more conclusive than one founded on *error in law*, is difficult to conceive. That the mode of admiralty trial is more favourable to the investigation of truth than that provided by our common law, is not, I apprehend, evinced by experience, nor do the opinions of some very eminent writers warrant any such conclusion.

*To sentences standing on such grounds, my mind is not yet reconciled to yield that controlling effect, now contended for. Nothing short of the law being made out in the clearest and most satisfactory manner, can, in my apprehension, justify the reception of those sentences, upon the broad ground now urged upon the court.

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There is another ground, remaining to be considered, on which it is with some difficulty I have been able to form an opinion.

The position of the insurer is, *that the assured, on entering into the policy, well knows the tribunal of the captors to be the prize-forum;* that a consideration of neutrality is essential to the determination; and, therefore, by the terms of his contract, assents to this test of his warranty. If the law, giving a conclusive effect to admiralty sentences, is to be deemed settled, then would the above conclusion correctly follow; then would the assured be presumed to know *that law*, and to assent by his contract to all its consequences: but, upon any other ground, he may with equal reason be presumed to assent to a limited operation of these sentences as *prima facie*, or presumptive evidence, reserving to himself a right, and taking upon himself the burthen of disproving the same, and verifying his warranty. Such must be the conclusion of the assured in *France*.

A mind conscious of the truth of the representation in the policy, would with difficulty be carried to the conclusion, that although the property insured be, in fact, neutral, yet if condemned it must from thence be deemed enemy's. Where the property, in fact, is neutral, and in such case
* 296 only, will the above opinion *operate; it is not to be presumed, that the assured calculates on the event of a condemnation. In the various cases of loss by any of the perils insured against, the falsification of the warranty is equally fatal to a recovery by the assured, though no foreign admiralty may have passed upon the question.

Such are the grounds on which my opinion on this important question is formed. I will only add, that it is with no small diffidence, I submit an opinion for the reversal of the judgment of a court, possessing, in so eminent degree, the high respect and confidence of the community.

Judgment of reversal.

Charles Newkerk, and Geertruyd his wife, Executrix of Peter Schuyler, deceased, Appellants, *against* Edward S. Willett, Respondent.

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A bill for a discovery and injunction to stay proceedings at law, must state some particular matter which the complainant has a right to seek a discovery of, as material to his defence, and without which he cannot proceed to trial. A mere inquiry because the grounds of the suit at law are unknown, cannot be maintained, being a fishing bill.

ON the 18th day of *April*, 1799, the appellants filed a bill in chancery, setting forth that the testator died in the winter 1792, and left the appellant, *Geertruyd Newkerk*, his widow and executrix. That soon after the respondent demanded a considerable sum of money, which she refused to pay; that the respondent thereupon offered to submit the controversy to arbitrament, which she also refused; that thereupon the respondent, in *April*, 1793, and after the intermarriage of the appellant *Geertruyd* with the appellant *Charles Newkerk*, commenced a suit against them, in the supreme court, for 1,000*l.* for moneys pretended to be due to him from said *Schuyler*; that the appellants did not, of their own knowledge, know any thing of the said demand; but had strong grounds to believe the *same to be unjust, because the respondent had not, during the life of said *Schuyler*, taken measures to adjust his claim, and because he did not possess any vouchers to establish the justice of his demand; that the relations and accounts given by the respondent were inconsistent and various, and that the appellants being unacquainted with the origin of the pretended debt, could not, without a discovery by the respondent of all the facts, safely proceed to a trial of the said suit. And that the respondent might, until he should have fully answered to the said facts and interrogatories, stated in the said bill, be enjoined from proceeding to a trial at law in the said suit, the appellants prayed an injunction, which was issued of course, on the usual affidavit.

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Fourteen days previous to the filing the above bill, viz. on the 4th day of *April*, 1799, the said appellants had filed a bill against the respondent, (in substance the same as the second bill,) to which the respondent had put in his answer

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before the second bill was filed, by which answer the respondent states, that in the year 1786 or 1787, he was possessed of certificates or public securities, amounting to 800*l.* and upwards, besides interest, which he, at the solicitation of the said *Schuyler*, delivered to him, on his promise to lay them out for the respondent's use in the purchase of forfeited lands; that he had several times applied to the said *Schuyler*, in his life-time, but without success, to render an account and come to a settlement for said certificates, and that on the last of those applications to the said *Schuyler*, at *Johnstown*, he declared he had sent the said certificates to *New-York* with his wife, the above appellant, to be disposed of, and that on her return he would pay the respondent for the same.

* 298 *The bill first filed, to which the answer was put in on the 14th day of *December*, 1799, was ordered by the Chancellor to be dismissed.

On the 4th day of *January*, 1800, the Chancellor, after hearing the arguments of counsel for both parties, ordered the injunction issued on the second bill to be dissolved.

On the above hearing, to dissolve the injunction, the Chancellor admitted the first bill, and the answer thereto, to be read; and also an agreement entered into in the suit, in the supreme court by *Willett against* the appellants, in which they consented and agreed "that the rule of reference be discharged; that the cause be tried by a struck jury; that the affidavits of *Teunis Van Wagenen*, *John Roorbach* and *Gerrit Staats*, jun. be admitted and read as evidence; that no writ of error shall be brought by the defendants merely for the purpose of delay; nor shall any bill in chancery be brought or filed.

The case now came up on an appeal from the Chancellor's order dissolving the injunction.

KENT, J. This is an appeal from an interlocutory order of the court of chancery, dissolving an injunction, without any answer being put in to the bill.

The two most material points which were raised at the argument, upon this appeal, were these:

1st. Is an order dissolving an injunction, one of the orders of the court below, upon which an appeal will lie?

2d. Did the bill contain sufficient equity to entitle the appellants to a discovery, and, consequently, to an injunction to stay proceedings at law, in the mean time?

*To discover the first question with accuracy and satisfaction; to draw the line between that class of *orders*, arising in the progress of a cause, which are susceptible of review by appeal, and that class of orders which are not susceptible, (and such a distinction may, and does exist,) would acquire more examination than I have had time to bestow, or than the late period of the session of this court would conveniently permit: I shall, therefore, give no opinion on the first point; nor is it necessary in the present instance, to the rights of the parties, because, admitting an appeal to lie upon the order, I am of opinion, on the second question, that the injunction was properly dissolved. * 299

The bill does not state sufficient equity, to entitle the appellants to a discovery. It states generally, that the respondent had made a *demand* upon one of the appellants, as executrix of *Peter Schuyler*, deceased; and that as he did not produce any voucher, she had refused to pay him. It states further, that he proposed an arbitration which she refused, and that finally, he had *brought a suit* against the appellants, in the supreme court. The bill states further, that the appellants know nothing of the demand *of their own knowledge*, but that they believe it unjust, because the respondent took no measures to liquidate and settle it, in the life-time of *Peter Schuyler*, and does not now produce any vouchers, and has been inconsistent, in what he has from time to time said, as to the nature and extent of his demand.

This is the substance of the bill; it amounts to this, the respondent has sued us at law, and we do not know for

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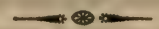
what, and therefore we ask for a discovery *beforehand, although we have reason to conclude he has sued us upon some groundless pretence.† Such a bill shows no *equity*, no *right* to a discovery. It sets forth no matter *material* to a *defence* at law, and which cannot be proven, unless by the *confession* of the opposite party. It is, to use Lord Chancellor *Hardwicke's* expression, a mere *fishing bill*, seeking generally, a discovery of the grounds of the respondent's demand, without stating any right, to entitle them to it; such a bill may be exhibited by any executor or administrator, and indeed by any defendant, who is not already in possession of the plaintiff's proofs. But the court of chancery has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery will state some *matter of fact material* to his *defence*, or which he wishes to substitute by the confession of the defendant, the court will not enforce a discovery.

† 2 *Vez.* 445. 492. 2 *Fonb.* 484. 1 *Vern.* 399.

I am accordingly of opinion, the appellants in the present case were not entitled to a discovery, and that the injunction staying the suit at law was properly dissolved, and that the order for that purpose be affirmed. And further, that the appellants pay to the respondent his costs of the appeal to be taxed.

Judgment of affirmance unanimously.



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*(SUPREME COURT.)

James Jackson, *ex dem.* the new loan officers of *Rensselaer* county, and John Crabb, *against* Isaac Bull.

A sale by loan officers, at auction, is within the statute of frauds. If a bargain for the purchase of land be concluded, and, at the expiration of some time, the conveyances duly executed, the subsequent deeds will so far have relation to the day of concluding the bargain, that an intermediate sale by the vendee will be good against him and his privies, and the possession of the original vendor, at the time of such second sale, cannot be urged as a possession adverse to the vendee, and that, therefore, nothing passed by his deed.

THIS case was stated thus: *John Crabb*, one of the lessors, purchased of the new loan officers, at public auc-

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tion, on the 3d *Tuesday* in *September*, 1795, one hundred and sixty acres of land. On the 31st *October*, and 4th *November*, following, he sold, by deed of bargain and sale, one hundred and forty acres, parcel, &c. to *Abraham Francisco*, under whom the defendant claims; and on the 5th *January*, 1796, he obtained his deed from the loan officers, in pursuance of his former sale, and now brings his ejectment on the latter deed, to recover the whole one hundred and sixty acres.

Question. Is he entitled to recover?

Per Curiam, delivered by KENT, J. I incline to the opinion that no legal estate, except a mere tenancy at will, vested in *Crabb*, until the loan officers had executed the deed. The statute of frauds prevents any greater estate from vesting without writing, and it is, besides, a general rule of law, that a corporation cannot sell land without deed; and the loan officers, in the present instance, are ordered by the act,† to convey the land they sell at auction, by deed, under the loan office seal.

† 14th *March*, 1792.

But I adopt, as a just rule of construction, and applicable to the present case, the principle laid down by this court, in the case of *Raymond* v. *Jackson*, *ex dem. June*,† "that whenever it is intended to be shown, that nothing passed by a grant, by reason that at the *time, there was a possession in another, adverse to the grantor, then the time to which the grant is to relate, is the time when the bargain for the sale was finally concluded between the parties; and that, consequently, any intermediate adverse possession, before the execution of the conveyance, (which is the only technical consummation or evidence of the grant,) can never affect it." In the present case, therefore, the deed to *Crabb*, of the 5th *January*, 1796, shall have relation back to the 3d *Tuesday* of *September*, 1795, being the time of the final conclusion of the bargain, by the sale and purchase, at public vendue, so as to render valid any intermediate sale or disposition of the land, by *Crabb*. Even supposing the deed of the 5th *January*, 1796, could not have this retrospective force by relation to

† *Jan. Term*, 1798.

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Cro. c. 110. *Co. Litt.* 45. a. 47. b. 352. a. b. 4 *Co.* 53. a. 2 *Mod.* 115. 6 *Mod.*258.1 *Salk.* 276. 2 *Ld. Raymond*, 1551 3 *P. Wms.* 373.

Co. Litt. 247. b. 265. b. 339. a. *Litt. sec.* 637.

Co. Litt. 45. a. 47 b. 8 *Co.* 53. b. 3 *P. Wms.* 373.

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the time of the conclusion of the sale and purchase at the vendue, still *Crabb* can never be permitted to claim in opposition to his deeds of the 31st *October*, and 4th *November*, 1795, by alleging, that he had no estate in the premises. For if a man make a lease by indenture of land which is not his, or levy a fine of an estate not vested, and he afterwards purchases the land, he shall, notwithstanding, be bound by his deed, and not be permitted to aver he had nothing. Whether a person can, in such case, be said technically to be estopped, because it is of the nature of an estoppel, to bind privies as well as parties; and *Coke* gives an instance, wherein an act of this kind, without warranty, will bind the grantor and not his heir; and whether a deed can operate at all by way of estoppel, if any interest passed by it, are points on which I forbear to give an opinion, because they are *not only something difficult, but not necessary to be discussed.

In the present case, there can be no doubt but that *Crabb* himself shall never claim against his own deed.

I am of opinion, therefore, that judgment be rendered for the plaintiff, for the twenty acres only.

Judgment for the plaintiff.

(SUPREME COURT.)

Johnson *against* Bloodgood.

When a note is purchased after due, every presumption is to be made against the purchaser. Therefore, if he state it to have been generally in such a year, and the maker has assigned his property under the insolvent law, on the 16th *January*, in that year, it shall be presumed, the purchase was after the assignment. A note purchased after due, and after an assignment under the insolvent law, cannot, in an action by the assignees, in the name of the insolvent, be set off against a debt due to the insolvent's estate.

THIS was an application to set aside a verdict, rendered for the plaintiff.

From the judge's report, the present appeared to be an action brought for the benefit of the creditors of the plaintiff, and, his name used merely to satisfy the forms of law.

The point to be decided was this; whether, in a suit brought by the assignees of an insolvent debtor, in his name, but for the general benefit of his creditors, the defendant shall be permitted, under the plea of payment, to set off a note of the insolvent, purchased *after* it became due, and after the assignment of the insolvent, though without actual notice of it, at the rate of 12*s.* in the pound, and for the purpose of such set-off.

KENT, J. This suit is substantially, between the creditors of *Johnson* and the defendant. It is now well understood, that courts of law will take notice of assignments and trusts, and consider who are beneficially interested, and will protect the *cestui que trust.*†

† *D.* & *E.* 620.

*In giving my opinion, I mean not to question the law that a bill or note may be negotiated after it is due,‡ and be declared upon as such. But I approve and adopt, as salutary, and calculated to prevent fraud, the doctrine laid down in the cases of *Brown* and *Davis*,§ and *Taylor* and *Mather*, that if a bill or note be endorsed after it becomes due, it throws a suspicion on the transaction, and the endorsee shall take it, subject to all the equity that existed in favour of the maker of the note, before it was endorsed; and if there be any attendant circumstances of fraud, the endorsee shall have every presumption turned against him. So in the present case, the defendant, stating only generally the year 1793, in which he purchased the note, it shall be presumed he purchased it after the 16th *January* 1793, the date of the assignment of the insolvent's estate.

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‡ 1 *Ld. Raym.* 575.

§ 3 *Durnf.* 80. 83.

When a note is offered for sale, after it has become due, and at a discount, what is the necessary inference? most certainly that the maker is insolvent; and, if so, his effects and credits ought immediately to enure to the benefit of his creditors, and he be regarded but as their trustee.

The presumption will be, because, so, indeed, justice would dictate, that the insolvent makes forthwith, a full and frank disclosure and assignment of all his property, for the payment of his debts. And if the insolvent do, in

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fact, make such an assignment, the purchaser in such a case, of a note, after the assignment at a depreciated rate, for the purpose of a set-off, though he may not, in fact, know of the assignment, is nevertheless properly chargeable with having acted under the presumption of notice of the *assignment. The law infers the notice, being what is termed *constructive notice*. 2 *Fonb.* 155. He accordingly commits a fraud upon the creditors; he does an act *mala fide*, and, as Lord *Kenyon* observed, in a case not very unlike the present, "it would be most unjust, indeed, if one person who happens to be indebted to another, at the time of the bankruptcy of the latter, were permitted, by an *intrigue* between himself and a third person, so to change his own situation, as to diminish or totally destroy the debt due to the bankrupt, by an act *ex post facto*."†

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† 6 *Durnf.* 59.

I accordingly continue in the opinion that was given at the trial, that the note purchased by the defendant was inadmissible testimony, under his plea of payment, and that the defendant take nothing by his motion.

Motion denied.

(SUPREME COURT.)

Betts *against* Turner.

On the sale of a note not negotiable, with a covenant by the vendor to pay the vendee a certain sum, "if the vendee should take all and every legal step the law directs, to prosecute to effect the maker and payee, to wit, if the vendee and no one in his name, or in that of the maker, could recover judgment legally, against the maker on the note, or against the payee, in case he had, at the date of the covenant, or should previous to the suit against the maker, *discharge* the note;" if, in an action against the maker, the payee, according to the laws of the country, go into court and deny authorizing the suit by the assignee against the maker, the assignee cannot maintain an action on the covenant against the vendor, if by the law of the country the payee be, in such case, liable for the amount without first showing a legal endeavour, by suit, to recover the amount against the payee. Covenants are to be construed not merely by their *letter*, but their *spirit*.

THIS was an action of covenant, and the declaration stated in substance, that *John Baker*, on the 17th *October*, 1795, gave a promissory note to *William Hooker*, by which

he promised to pay him, or his order, on the 1st day of *April*, 1797, 833 dollars and 33 cents; that the defendant sold the note to the plaintiff, to be by him collected at his own risk and costs, as it respected the ability of *Baker* and *Hooker*, and that the defendant covenanted to and with the plaintiff, to pay him 2,000 dollars when required, "in case the plaintiff should take all and *every legal step as the law directed, to prosecute to effect *Baker* and *Hooker*; to wit, if the plaintiff, and no one in his name, or in *Hooker's* name, could recover judgment legally against *Baker*, on the note, or against *Hooker*, in case he had, at the date of the covenant, or should, previous to the suit against *Baker*, discharge the note."

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The declaration further stated, that *Baker* resided in *Massachusetts*, and that on the 31st *July*, 1797, the plaintiff sued *Baker* in *Hooker's* name, according to the laws of *Massachusetts*; that *Hooker* came into court and denying that he had ever authorized the suit, the court dismissed it; that the plaintiff had taken all legal steps to sue *Baker* upon the note, and that he could not sue upon it in his own name, either *Baker* or *Hooker*; that *Hooker* had never negotiated the note, so as that any person could sue upon it in his name but himself; and that *Hooker* had never discharged the note.

To this declaration the defendant pleaded, that *Baker* and *Hooker* reside in *Massachusetts*, and that the note was sold by *Hooker* to one *Cole*, and by him to one *Booth*, and by *Booth* to the defendant, who sold it to the plaintiff; that such notes were not negotiable by the laws of *Massachusetts*, so as to enable the assignee to sue in his own name, but that he could sue in the name of the original payee, and that if the payee *released the suit or discharged the note*, he became liable to the holder, for the amount of such note, of which law the plaintiff, at the time of the delivery of the note, had notice; and that the plaintiff did not prosecute *Hooker*, nor attempt to recover a judgment against him

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on the note, as he might and ought to have done, according to the laws of *Massachusetts*.

*To this plea there was a general demurrer and joinder.

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Per Curiam, delivered by KENT, J. By the covenant it appears, that the plaintiff was to do a previous act, to entitle him to maintain a suit on the covenant. This previous act, like all other stipulations in covenants, must be done fairly and faithfully, according to the spirit and intention of the agreement. It may be proper to observe, as a rule in the construction of covenants, that they are to be performed according to their spirit rather than their letter, "*ut res magis valeat quam pereat.*"

The beneficial end that the parties had in view, is to be primarily regarded and enforced; and, therefore, when an obligee engaged to deliver up his obligation to the obligor, by such a day, and he, in the mean time, put it in suit, recovered upon it, and then delivered it; this, although a compliance with the *words* of the agreement, was held no performance of the *intent*.† So, where A. covenanted with B. that he should enjoy a term of six years, discharged from tithes, and a suit was brought, *after* the expiration of the term, for the intermediate tithes, it was held, that B. was as much prejudiced by a suit after the term as he would have been before, and that the intent of the covenant was, that he should be freed from suit and payment; the covenant, therefore, broken.‡ By the same just and liberal rule of interpretation, it is declared, that if one covenant to deliver the grains made in a brewhouse, and in the mean time he mix them with hops, so as to render them unpalatable to cattle; or engage to deliver so many yards of cloth, and he cut it in pieces, and then deliver it; or if he covenant to leave the timber on the land, at the expiration of a lease, and he *cut it down and so leave it,§ these, and numerous other instances of the like kind, to be met with in the books,¶ are all alleged to be breaches of the covenant because, the law regards not a *literal* but a *real* and

† *Cro. Eliz.* 7.

‡ *Cro. Eliz.* 916.

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§ *T. Raym.* 464.

¶ See 1 *Sid.* 48. 151.

faithful performance of contracts, according to the *intent* of the parties.

These principles ought to be kept steadily in view, as having an application to the present case.

It is pretty obvious, that the defendant did not intend to pay the 2,000 dollars, until the plaintiff had faithfully tried, and tried in vain, to recover the amount of the note from *Baker* and from *Hooker*. The note was sold to the plaintiff to collect at *his own risk*, so far as respected the ability of *Baker* and *Hooker;* and it was a condition precedent to the payment of the money by the defendant, that the plaintiff should take all and every legal step, as the law directed, to prosecute to effect *Baker* and *Hooker*. He did take those steps to prosecute *Baker*, but not to prosecute *Hooker*, although the latter became liable to him, for releasing the suit he had instituted in his name against *Baker*.

Here, then, appears a palpable failure on the part of the plaintiff, of an act which was necessary to entitle him to his suit against the defendant; I mean the failure of taking the steps by law directed, to prosecute to effect *Hooker* as well as *Baker*.

It may, however, be objected, that the case in which *Hooker* is to be prosecuted, is afterwards particularly stated in the covenant, and that *Hooker* was only to be prosecuted, if he had, at the date of the covenant, or should, previous to the suit against *Baker*, discharge the note; and that, never having *discharged the note, the plaintiff was under no necessity, by the covenant, of prosecuting *him*. To this, I answer, that, although this be the *letter*, it cannot be the *intent*, of the agreement. The agreement, in the first instance, provides generally, that the plaintiff shall prosecute to effect both *Hooker* and *Baker*, and it then proceeds to specify the instance in which *Hooker* is to be prosecuted; to wit, if he had then already, or should, previous to a suit against *Baker*, discharge the note. But the rational meaning of the covenant, deficient as it may be in

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perspicuity and precision, cannot be otherwise than this; that the plaintiff should first prosecute *Baker*, and if *Hooker* should prevent him from recovery against *Baker*, that he should then prosecute *Hooker*.

The defendant seems to have contemplated but a *single* case, in which *Hooker* could prevent a recovery, and that case, which was the discharge of the note, he has specified; whereas, an interference in *Hooker*, by discharging or releasing the suit, was an equal impediment to a recovery, and equally exposed *Hooker* to a prosecution.

The plaintiff was to take every legal step to obtain a recovery, both against *Baker* and *Hooker*, but he omitted to take any step against *Hooker*, and now alleges, as his sufficient excuse, that *Hooker* did not prevent a recovery against *Baker* in the manner mentioned and expressly provided for in the covenant. It is true, he prevented a recovery by discharging the *suit;* but he did not prevent a recovery by discharging the *note*, and he must prevent the recovery *in the latter mode, and not in the former; otherwise he was not to be prosecuted.

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I dislike any such subtle distinction, calculated, as it appears to me, to elude the end and design of the covenant; for I cannot conceive any possible inducement, on the part of the defendant, to stipulate, that the plaintiff should previously prosecute *Hooker*, if he prevented a recovery against *Baker*, by discharging the note, which would not equally be felt, and equally operate, if *Hooker* prevented a recovery against *Baker*, by discharging the suit. And for the plaintiff to pretend, that he was bound to prosecute *Hooker*, in the one case, because it was expressly mentioned in the covenant, and not bound in the other case, because it happened to be omitted, although precisely within the same reason, is for him to construe the article by its *letter*, and to disregard its *spirit*. It is, in allusion to the cases mentioned, to deliver up the obligation by the day, but in the mean time, to prosecute and recover upon it. It is to deliver the cloth,

but after it is cut to pieces. It is to leave the timber on the land, but to leave it prostrate.

I am, accordingly, of opinion, that the plaintiff has not shown, in his declaration, the requisite previous performance on his part, and that judgment ought to be rendered for the defendant.

Judgment for the defendant.

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If the endorsor of a note pay it after the discharge of the insolvent maker, under the insolvent law, the discharge is no bar to a subsequent recovery against the maker.

FROM the circumstances stated in this case, it appeared, that the defendant, on the 3d day of *January*, 1792, gave the plaintiff a promissory note for 9,299 dollars and 44 cents, payable in 90 days; that the plaintiff endorsed the note, and it went into circulation; that it was not paid when due; that the defendant was afterwards discharged under the insolvent act, and, at the time of the discharge, the note belonged to *Archibald Mercer;* that subsequent to the discharge, to wit, on the 1st *July*, 1794, the plaintiff paid 3000 dollars, took up the note, and brought this suit to recover that money back from the defendant.

The question upon these facts, was whether the debt, now claimed of the defendant, was a debt which the plaintiff could have asserted as his own, and have verified upon oath, as a specific and certain debt on the 2d day of *March*, 1793, when the defendant procured his discharge? In other words, was it a debt provable against the estate of the insolvent?

Per Curiam, delivered by KENT, J. The act of insolvency, of the 21st *March*, 1788, in pursuance of which the defendant obtained the discharge which he now sets up, in bar of the plaintiff's right of action, extends the discharge

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to such debts, and to such debts only, as are due at the time of the assignment of the insolvent's estate, and to debts contracted for before that time, though payable afterwards. Those debts must be specific, and certain sums of money,

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to which the creditor can make oath, as being *justly due, or to become due at some specified time. Unless the creditor, *at the time of the assignment*, be able to produce and verify such debt, in such manner, he would not be entitled to receive from the assignees, his dividend of the insolvent's effects, nor would he be barred from his future action against the insolvent.

Therefore, although the plaintiff in the present suit was, as I take for granted, on non-payment of the note by the defendant, duly fixed as endorsor, and although this was prior to the defendant's discharge, yet, until he had actually paid the holder of the note, and taken it up, he could not be said to have a certain and ascertained debt due to him from the defendant. His demand upon the defendant depended upon the defendant's final non-payment of the note, and his payment of it for him. He stood, in respect to the defendant, in the relation of a *surety* only; and what portion of the note, if any, short of the whole sum, the defendant himself might be able to pay the holder, was a matter altogether uncertain. So that the plaintiff, until he paid the 3,000 dollars, and took up the note, had not any specific and certain debt due to him from the defendant, and as, therefore, this debt, which is now demanded, accrued subsequent to the defendant's discharge, and, in consequence of an actual payment by the plaintiff, the plaintiff was not entitled to claim his debt from the assignees of the defendant, and, consequently, the discharge of the defendant cannot be a bar to a recovery in the present suit.

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*This construction of the operation of our insolvent act, is the same with that of the *English* bankrupt law *in consimili casu.*

The stat. 4 and 5 *Ann.* c. 17. which was continued by the stat. of 5 *Geo.* II. c. 30. sec. 7. extends the discharge of

the bankrupt to *all debts* by him *due or owing* at the time he became a bankrupt, and the stat. of 7 *Geo.* I. c. 31. extends it to debts contracted before the bankruptcy, though payable after. These statutes, in this respect, are to the same effect, and almost precisely in the same words with our act of insolvency, when it declares the force and extent of the insolvent's discharge.

By the *English* decisions upon those statutes, it has been frequently determined, and seems to be a rule permanently settled, that if the creditor, at the time of the bankruptcy, had not a certain debt due, to which he could attest by oath, and which he could bring in under the commission of bankruptcy, he is not barred by the bankrupt's discharge; and, in like manner, that a *surety*, although he be liable *before*, yet if he does not actually *pay* the debt till after the act of bankruptcy be committed, he then cannot prove it under the commission, and may resort to the bankrupt.

3 *Wils.* 14. 269. 276. 347. 530. 6 *Durnf.* 489. 1 *H. Black.* 640.

3 *Wils.* 347. *Cowp.* 526. *Durnf.* 599.

It has been objected, and with some plausibility, to this doctrine, that if a *debt* be due at the time of the assignment to any one who might have proved it, it must be done away by the discharge; for that the insolvent is discharged from all his *then debts* to whomsoever they may belong, and that if, when discharged from the action of one creditor, he were to remain liable *at the suit of another for the same debt, it would be no discharge at all. These objections were raised and overruled in the cases of *Taylor* v. *Mills and Magnall*,† and of *Brooks* v. *Rogers*.‡ The answer appears to me to be plain and sufficient, that where a plaintiff cannot prove a debt till he has actually paid the money, and the payment be of the proper debt of the insolvent, and after the assignment of his estate, the cause of action in such case arises *after* the insolvency, although upon a *pre-existing ground*, and as he cannot exhibit his debt to the assignees, because there was no sum due, to which he could attest when the assignment was made, it is highly, nay, *indispensably* just, that he should resort to the insolvent himself.

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† *Cowp.* 523.

‡ 1 *H. Black.* 640.

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I am, accordingly, of opinion, that judgment be rendered for the plaintiff.

Judgment for the plaintiff.

(SUPREME COURT.)

Jackson, *ex dem.* Jane Van Alen, *against* Rogers.

A parol gift of lands creates only a tenancy at will. If the donee lease, and the donor do not ratify his act, the mere permitting the lessee to build and enjoy under the term, will not prevent the donor from legally devising the land, and his devisee may recover without notice to quit.
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THIS was an action of ejectment for a store and lot at *Kinderhook*, on a demise laid 1st *June*, 1795. The application was to set aside a verdict for the plaintiff, and grant a new trial. The facts of the case were these:

Lawrens J. Van Alen was in possession of the premises for a period of more than 30 years before the bringing of the present suit. *John C. Holland* married his daughter, and was a drunken dissipated character, frequently requesting *Lawrens* for a deed of the premises, and was as often refused: at last, he, *Lawrens*, said to him, and but once, "well *John*, *you may take the kraal, (meaning the premises,) and I will deduct 60*l.* from your wife's portion;" no writings were signed, and these expressions were before building the store in question.

Holland afterwards leased the premises to *McMechen* for nine years, and *McMechen*, in consideration, was to build a store on them; he did so, and at the time he began to build, *Lawrens* had grain on the premises. *Lawrens* was at first dissatisfied when he heard *Holland* had made the lease, but afterwards was *satisfied*, saying it would benefit *Holland's* children. The lease was made in the year 1785. In *August*, 1794, *Holland* (the first lease being out) made a second lease to *McMechen* (the partner of the defendant) for five years, at the annual rent of 30*l.* *Lawrens* heard of the second lease from strangers, and was *dissatisfied* with it, particularly when he found the rent was not to benefit *Holland's* children. He frequently talked of taking the

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property into his own hands, and afterwards devised *the lands* to the lessor of the plaintiff for life, by will dated 19th *June*, 1790. *Lawrens* died in *May*, 1795; the action was brought without any notice to quit.

The question on these facts submitted to the court was, ought the lessor of the plaintiff to recover?

Per Curiam, *delivered* by KENT, J. In the argument for a new trial in this cause on behalf of the defendant, it was contended that the lessor of the plaintiff ought not to recover:

1st. Because the lease from *Holland* to *McMechen* amounted to a disseisin of *Lawrens* *J. Van Alen*, and destroyed his capacity to devise.

2d. That the second lease from *Holland* to *McMechen*, was still subsisting at the commencement of the suit, and was a lawful impediment to the plaintiff's recovery.

*3d. That the defendant was, at all events, to be deemed a tenant from year to year, and so entitled to six months' *notice* to quit. * 316

1st. To constitute an actual disseisin, or one *in fact*, there must be a tortious entry and an actual expulsion. No such thing appears, or was pretended in the present case, nor was there a disseisin admitted by *election*. The distinction of a disseisin by election, as contradistinguished from disseisin in fact, was taken for the *benefit of the owner* of the lands, to extend to him the easy and desirable remedy of assise, instead of the more tedious remedy of a writ of entry. Whenever an act is done, which immediately, and of itself, creates an *actual disseisin*, it is still taken to be an actual disseisin, notwithstanding the introduction of the doctrines of disseisin by election; as, if a tenant for years, or at will, should enfeoff in fee; and on the other hand, those acts which are susceptible of being made *disseisins by election*, are in fact no disseisins till the election *makes them so*; as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years.

1 *Burr.* 79. 1 *Salk.* 246.

1 *Burr.* 110. *Sanders on Uses*, 240.

Sanders on Uses, 240, 241, 242. *Butler's Co. Lit.* 330. b. n. 285. *Harg. Co. Lit.* 57 a. n. 379.

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No such election was ever made in the present case, and consequently there was no disseisin. Making a devise has been deemed, in a similar case, an intimation of an election, not to be disseised; and if *Holland* was tenant at will, (and no greater interest can be inferred in him, because no greater interest can be created *by parol*,) a lease for years by him can be no disseisin, unless the true owner elect to make it so, nor does it destroy his capacity to devise.

Palm. 205. *Cro. J.* 659. 1 *Burr.* 112, 113. *Comp.* 693. 1 *Burr.* 111.

These are briefly the settled distinctions between disseisins in fact, and disseisin by election. They were generally hinted at or brought into view, commented upon and explained, in the case of *Atkins and Horde*, one of the most learned and elaborate judicial discussions on a question of real property to be met with in modern times, and they are likewise historically and ingeniously illustrated by *J. W. Butler*, in one of the notes to his edition of *Coke upon Littleton*.

1 *Burr.* 60. * 317

I shall therefore pass the whole of this doctrine *by*, as having no influence on the present case, nor should I have noticed it at all, had not the counsel for the defendant appeared to rely much upon it, and to consider it as strong ground in the cause.

2d. In respect to the existence and force of the second lease from *Holland* to *McMechen*. I would observe, that notwithstanding the gift of the premises to *Holland* by *Lawrens*, he had never any greater interest in them than an estate *at will*, because *Lawrens*, to whom the premises belonged, never alienated them to him by deed *or writing*, nor made any parol demise of the same for a *term* not exceeding *three* years, and reserving a *rent* thereon. *Holland* was, consequently, by the force and effect of the statute of frauds, but a tenant *at will*, when he made the first lease to *McMechen*; and when he made the second lease, he was still but a tenant at will, and so had no *authority* to make either lease, because such authority resides not in a tenant at will; nor can a parol gift of land in fee operate as an *authority* to make leases, because the statute of frauds de-

clares expressly what shall be the operation of such parol grant; it shall "have the force and effect of leases or estates at will only, and shall not have any other, or greater force or effect." I therefore do not regard any intimation that may be given by the circumstances of the *subsequent assent*, either tacit or express, of *Lawrens*, to either the first or second lease; because it is a settled doctrine that no *subsequent assent* will make good a *void* lease, although subsequent acts may operate as a new grant. Both the leases to *McMechen* were, therefore, from the beginning, null and *void*, because made by a tenant *at will* who has no capacity *to grant*.

1 *Durnf.* 94. *Cowp.* 482. *Doug.* 50. 7 *Durnf.* 85. *Cro. E.* 156.

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3d. The third point is, whether the defendant was entitled to *notice* to quit.

Where the holding is not for a determinate period, but from the reservation of an annual rent, or from other circumstances, is susceptible of being construed into a holding from *year to year*; in such cases the courts have adopted as a rule favourable to the interests of both *landlord and tenant*, that neither party shall determine the lease without six months' previous notice to the other, of that intention; but where the lease is for a definite period, or determinable on a certain event, no notice is requisite, as both parties are apprized of the termination. So if the tenant be *strictly* a *mere tenant at will*, as where one enters under a *void* lease; there, I apprehend, no notice is necessary. The *Nisi Prius* decision in the case of *Goodtitle*, ex dem. *Adeare* v. *Prentice*, before *Gould*, J. in 1790, is expressly to this point.

2 *Black. Rep.* 1173.

1 *Durnf.* 161.

Esp. Dig. 446.

In the present instance the defendant, the partner of *McMechen*, entered under a *void* lease, and became a *mere trespasser*, if *Lawrens* chose to make him so, and so continued to the bringing of the suit; no subsequent *agreement* was made, no actual *rent was stipulated* for between him and *Lawrens*, none was *demanded or paid*. *Lawrens* did nothing to recognise *him as *his tenant*, and to create between them the relation of *landlord and tenant*, and consequently no notice was necessary.

Cro. E. 830. 2 *Co.* 55. *b.* 1 *Wils.* 176.

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The People v. The Sessions of Chenango.

I am, accordingly, of opinion, that the defendant take no thing by his motion.

Judgment for the plaintiff.

(SUPREME COURT.)

The People *against* The Sessions of Chenango.

The Sessions cannot grant a new trial on the merits; if they do, a *mandamus* will go forbidding them to proceed.

THIS was an application for a *mandamus*, forbidding the Sessions of *Chenango* from proceeding on a new trial they had granted.

Per Curiam, delivered by KENT, J. Let the *mandamus* go. The sessions cannot grant a new trial upon the merits. It is a power *not exercised* by this court, after verdict in cases *of felony*, and perhaps it is expedient it should not be. This court had by its original constitution by ordinance, the superintending control of all inferior jurisdictions within the state, and this power has never been taken away. It has been from time to time recognised by law, and in constant and vigilant exercise. All courts within the several counties have, from the first foundation of our judicial system, been regarded by law and by practice as inferior courts; they can be compelled to duty by a *mandamus*; they can be restrained from usurpation by *prohibition*.† The causes and pleas before them, can be arrested and removed by *habeas corpus* or *certiorari*, and their judges can be *attached*, brought before this court, and punished for disobedience. All these are distinguished and essential marks of supremacy in the one court, and of inferiority in the *other; they are, therefore, within the reason and meaning of the law, *inferior* courts, and such courts are not entrusted *by law*, with the power of setting aside verdicts of juries upon *the merits*. It has been the uniformly received usage and understanding on the subject, until very lately, that that

† *Prohibitions* are *ex debito justiciæ*, when an inferior court acts without jurisdiction. They will lie to courts-martial. See the case of *Grant*, 2 *H. Black.* 69.

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power was exclusively confided to this court; it can neither be taken from this court, nor assumed by the sessions without express words.

There are strong reasons for the law withholding the power from the courts of general sessions of the peace. All the justices of the peace, within the county, are judges of the court. This renders it a very numerous tribunal, and divides and weakens the responsibility of the members. The justices are laymen, and cannot be supposed to have been taught or trained in the science of law. The power of awarding new trials on the merits, is a power necessarily resting in sound legal discretion. The reasons of the exercise of that discretion, are not stated on the record, and are not susceptible of review by this court. The power may be grossly abused; different principles and contradictory practice may be assumed in different courts; verdicts may be set aside, *ad infinitum*, till juries are worried into submission; they might be set aside where the prisoner is acquitted, as well as convicted, and the power thus unlimited and unreviewed, might go to the destruction of trial by jury; to overturn the rights of the citizen; to shake the stability of government, and destroy all system and harmony in our jurisprudence.

I am, with perfect satisfaction, of the opinion, that this great and transcendant *trust*, rests *solely* with this court; a court which the constitution and law *has taken care so to * 321
organize, as to contemplate it *fit and competent*, for the due and safe exercise of this very delicate power. We cannot alienate any part of our *trust*; we are responsible for its safe keeping, and that no *waste* be committed on a power we hold for the security of our citizens, in their liberties and estate.

(Supreme Court.)

Lodge *against* Phelps.

An action is maintainable in our courts on a promissory note within our statute by the holder, though made in *Connecticut*, where the suit must be in the name of the original payee.

THE question in this case was, can the assignee of a promissory note given in *Connecticut* maintain a suit upon it here *in his own name*, since he is not permitted to do so there?

2 *Ersk.* 473, 474. 1 *Bro. P. C.* 41. 1 *Black. Rep.* 237, 238. 258. 7 *Durnf.* 243.

Per Curiam, delivered by Kent, J. That personal contracts, just in themselves, and lawful by the law of the land where made, are to be fully enforced according to the intent of them, notwithstanding any change of habitation by the parties, is a principle of justice and social policy which ought every where to be received and supported. But the admission of the *lex loci contractus* can have reference only to the nature and construction of the contract, and not to the *mode* of enforcing it; for every country must and will have precedents and judicial forms peculiar to itself, and under the solemnity of these forms will enforce contracts according to their true intent and spirit.

2 *Ersk.* 475. 1 *Bos. & Pull.* 142.

The note on which the present suit was brought, was made payable to the payee or *his order*, and he ordered the money to be paid to the plaintiff; the plaintiff, therefore, by the rules of equity, not only in *Connecticut*, but in every country where equity is known, *is entitled to receive the money in preference to the original payee. What just reason can there then be, that the plaintiff should not be permitted to avail himself here of the forms and remedies prescribed by our laws, and to sue *directly in his own name* for the money, but should rather be compelled, agreeably to the usage of *Connecticut*, to use the name of the original payee as a mere nominal plaintiff, or *dramatis persona*? If the defendant has any defence authorized by the law of *Connecticut*, let him show it, and he will

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be heard in the one form of action as well as in the other. Agreeably to the principle I have laid down, I am for allowing him every defence that he would have been entitled to make in *Connecticut*, had the note been sued there in the name of the original payee; and as long as this can be done, I do not perceive any sufficient reason for turning the plaintiff round to another suit. To permit innovations upon our forms of action, when not necessary, may lead to inconvenience.

Judgment for the plaintiff.

(SUPREME COURT.)

Covenhoven *against* Seaman and others.

THIS was an action of debt on recognisance, in which the defendants bound themselves to the plaintiff in 100*l.* that a certain *Jacob Jones*, whom the plaintiff claimed and detained as his slave, and who had sued out his writ of *homine replegiando*, should *prove his liberty* in the most proper and expedient way and means, and should *personally appear in this court*, and his suit in that behalf *prosecute with effect*.

If a recognisance in a *homine replegiando* be, that the slave claimed, should prove his liberty, and personally appear in court and prosecute his suit with effect, it is forfeited by the appearance and surrender of the slave to the person claiming, notwithstanding he be on such surrender accepted.

The plaintiff averred in his declaration, "that the said *Jacob* did not prove his liberty, nor prosecute his *suit in that behalf with effect, but *suffered judgment as in case of nonsuit*, to be entered against him for not proceeding to trial."

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The defendants by their plea stated, "that after the said judgment of nonsuit, the said *Jacob did appear* in this court, and then on the prayer of the plaintiff *surrendered himself* to him, who accordingly *accepted* him, and that the defendants have since *paid to the plaintiff his costs of suit*." To this plea there was a general demurrer and joinder.

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Per Curiam, delivered by KENT, J. The defendants by this recognisance, and which appears to have been taken agreeably to precedent, undertook for three things.

1st. That *Jacob Jones* should *prove his liberty* in the most expedient way.

2d. That he should personally appear in this court.

3d. That he should prosecute his suit in that behalf *with effect*.

Instead of this it appears that *Jacob Jones* has not proven his liberty, nor prosecuted his suit with effect, but has suffered judgment to be entered against him as in the case of nonsuit, and has, at the prayer of the plaintiff, surrendered himself to him.

The condition of this recognisance has certainly not been complied with; a party submitting to a *nonsuit*, does not prosecute a suit to effect;† nor if the writ be *abated* for any cause, will it save the recognisance, unless another writ be issued out with due diligence. The case given in *Fitzherbert*‡ is closely analogous to the present. "In a *homine replegiando*, the plaintiff was bound in a recognisance in a certain sum of money to the defendant's use that he would sue him, **cum effectu;* and if the writ be abated for any cause yet he ought to sue another writ for that taking, &c. otherwise he shall forfeit his recognisance. H. 8. H. 4.

† *Carth.* 519.

‡ *N. B.* 68. *a.*

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The only question that can be raised in this cause, is whether the surrender to the plaintiff is a discharge from the recognisance. I find no authority, nor any reason to think so; there were good inducements for the stipulations in the recognisance that a suit should be prosecuted to effect, and the question of the freedom or servitude of *Jacob Jones* judicially determined. It would either silence the unjust pretensions of the plaintiff, and forever deliver the man from bondage, or it would quiet him in the lawful possession of his property. The surrender of *Jones* to the plaintiff, and his acceptance of him, leaves the question still undetermined.

I am, therefore, of opinion, that the plea is bad, and that judgment be rendered for the plaintiff.

Judgment for the plaintiff.

(SUPREME COURT.)

Judah *against* Randal.

Under a policy on a chariot, "free from average," but in which jettisons make one of the perils insured against, if the box of the chariot be thrown overboard in a storm, it is a total loss, and the insured entitled, on abandoning, to recover as such, though the carriage be on deck.

THIS was an action on a policy of insurance in the usual form, but free from average, on a chariot to be carried on deck.

On the voyage the box was thrown overboard in a storm to lighten the vessel; she afterwards arrived safe with the remaining parts of the chariot.

It appeared the box is ordinarily estimated at two thirds of the price of the whole chariot. Verdict for the plaintiff, as for a *total* loss of the chariot, subject to the opinion of the court on the following question: *"Whether there hath been such a loss as to make the insurer liable? if so, the verdict to stand; if not, to be set aside, and the defendant to take judgment as in case of nonsuit."

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Per Curiam, delivered by BENSON, J. The very statement of the question implies it to be admitted by the parties, and which is certainly the case, that the only question between them is, whether the loss is to be deemed a *total* loss, or only a *partial* or *average* loss of the chariot? By the express terms of the policy, jettison was one of the perils which the insurer took upon himself; but at the same time, the insurance being also expressly *free from average*, the jettison must not be a *partial* or *average* loss only, but must amount to a *total* loss of the *thing* insured, so that the inquiry (and which is impliedly admitted in the question submitted to the court as stated between the parties) is, had the plaintiff a right to abandon to the defendant the remain-

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ing parts of the chariot which were saved, and sue as for a *total* loss? My opinion is, that he had.

The part lost exceeded more than half the value of the *whole* chariot, the *thing* insured. The box being lost, the chariot cannot, with any propriety, be considered so to have arrived *in specie* as that it required to be *repaired* only to have again become a *whole* chariot. With respect to a chariot and every other wheel-carriage having a box, the seats for the persons to be conveyed, wheels, the perch with the axle-trees, springs and other parts affixed to it, and the pole or shafts are sometimes *collectively* denominated the *carriage-part*, as distinguished from the *box* and its immediate fixtures. If a wheel, or any other part of the *carriage-part* should be lost, or be so *injured, as to be wholly unserviceable, and therefore a *new* part become necessary in the place of the part so lost or injured, the chariot would be said to be *repaired* only; but if the box should be lost, or be so injured, it could not, with propriety, be said that the chariot was *repaired* by a *new* box, it would be considered as a *new* chariot, but that the *old carriage-part* was made to serve. The case of a vessel, put by the plaintiff's counsel, is perfectly analogous and just. There may, as between *insured* and *insurer*, be a *total* loss of the vessel, although *all* the spars, sails and rigging may be saved. A new hull may be built and designedly of a form and burthen so as to be adapted to the spars, sails and rigging saved without any alteration in them, and be fitted out with them accordingly. This would not restore the identity of the *vessel lost;* as by the loss of the *hull* the vessel is lost; so by the loss of the *box* the chariot ceased to exist in specie.

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Judgment for the plaintiff.

(Court of Errors.)

Cuyler and others, Appellants, *against* Bradt and others, Respondents.

THE appellants' bill in the court of *Chancery* set forth:

1st. A patent of the 2d *June*, 1688, to *Van Rensselaer*, *Van Cortlantd*, *Van Ness*, and *G. T. Van Vechten*, for the land called *Hosick;* and,

That no tenancy *in common* being expressed, the estate at *law* was of *course* in *joint-tenancy*.

*2d. The will of *G. T. Van Vechten* of the 12th *March*, 1703, 1704, devising his *farm*, &c. and all his residuary *real* estate, to his sons, *Johannes* and *Volchert*, *as tenants* in common, in *equal* parts.

3d. The deaths of *Van Rensselaer* and *G. T. Van Vechten*, before severance of the *joint-tenancy*.

4th. A conveyance, afterwards, of the 18th *October*, 1706, from *Van Ness* and *Van Cortlandt*, the surviving patentees, to *Johannes*, as the son of *G. T. Van Vechten*, which, after reciting the patent, further recites, that the lands were purchased from the *Indians*, and the patent obtained at the joint and *equal* expense of the patentees; that it was their true intent, purpose, and meaning, that they should hold as *tenants in common*, without any advantage by reason of joint-tenancy or survivorship. That by the death of *G. T. Van Vechten* and *Van Rensselaer*, before partition or any act to destroy or cut off the right of survivorship by reason of the joint-tenancy, according to such true intent, purpose and meaning, *Van Ness* and *Van Cortlandt*, as survivors, were, by such means, in the eye of the law, become sole proprietors; that they, having regard to the premises, and for a *nominal* consideration in money, conveyed to *Johannes*, an equal undivided fourth part of the lands.

5th. A conveyance from *Johannes*, of the 30th *October*,

Where several patentees bear, in equal proportions, the expense of obtaining a patent, and by the recital of deeds among themselves, it appears they intended to purchase in common, they will be taken as tenants in common and not as joint-tenants, though the patent be to them jointly. A conveyance with a recital of the intent of a purchase, is a conveyance with notice, and the grantee takes subject to trusts implied as well as expressed.

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1741, to *Bradt*, *Brees* and *Van Beuren*, his *sons-in-law*, reciting a partition of part of the lands among the proprietors, on the 20th *November*, 1732, when lots No. 2. 10, 11. 18. 20. and 21. fell to the share of *Johannes*, and lot No. 7. fell to the share of *J. Van Rensselaer*, and conveying to them, in consideration of *thirty* pounds, all such right, estate, title, interest and demand, whatsoever, as he had, or ought *to have, in those lots, and the undivided land; and that this conveyance was either *voluntary*, or if for *valuable* consideration, then *with notice* of the right or claim of *Volchert*.

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6th. A deduction of the title of the appellants as the representatives of *Volchert;* and,

7th. That the respondents hold as volunteers under *Bradt* and *Brees*.

The scope of the bill then was, that the appellants might be let in for a moiety of the lands held by the respondents by title derived from *Bradt* and *Brees*, and to have an account of the rents and profits.

To this bill the respondents demurred, and the demurrer being allowed, there was a decree of dismissal, but the decree being reversed on appeal, and the cause remanded to the court of *Chancery*, the respondents put in their answer, and proofs were taken.

The only *material* question, as to facts contested between the parties, was, whether there was sufficient evidence to find that the conveyance from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, was either *voluntary*, or if it was for valuable consideration, then that it was with notice of the right of *Volchert*.

The *proofs* as to these *facts*, were,

1st. A partition-deed of the farm of *G. T. Van Vechten*, between *Johannes* and *Volchert*, of the 9th of *June*, 1707, reciting the *will* of their *father*.

2d. A mortgage from *Johannes* to *Coyeman*, of the 2d *September*, 1723, reciting the deed from *Volchert* for the

parcels, which, on the partition, fell to the share of *Johannes*, and which then constituted his *farm*.

3d. A conveyance from *Van Beuren* to *J. Van Rensselaer* of the 22d *May*, 1749, reciting a conveyance *from *Johannes* to *Brees*, *Bradt* and *Van Beuren*, of the 12th *August*, 1738, for all his *farm*.

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4th. That on the 2d *June*, 1740, *Brees*, *Bradt*, and *Van Beuren* paid 8*l.* 0*s.* 2*d.* for *Johannes* to one *Fresneau*.

5th. That on the 22d *July*, 1744,—5 *Bradt*, *Brees*, and *Van Beuren* became bound with him to one *Dow*, for 52*l.* 8*s.* 0*d.* and that they also became bound with him to one *Staats* in about 300*l.* but the time is not mentioned.

6th. That *Van Beuren*, in 1748, sold his share of the lands under the conveyance from *Johannes*, of the 30th *October*, 1741, to one *Collins*, for 20*l.*

7th. The deposition of *Bleeker*, examined as a witness. He tetsified, that he drew the deed from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, of the 30th *October*, 1741; that previous to the execution of it, he showed it to *Volchert*, who directed his son to go to the witness and tell *Johannes* not to execute it; that the son told *Johannes* he was directed by his father to desire him not to execute it; that *Johannes* immediately, thereupon, left the room, and after an absence of about fifteen minutes, returned and said, what *shall I sign? I have already signed to Dow and Jansen;* that *Bradt*, *Brees* and *Van Beuren* were present, and *Brees* told him that he did not sign away any more than he had, and then *Johannes* signed it.

On the hearing, on the bill, answer and proofs, the Chancellor again decreed the bill to be dismissed, and thus assigined his reasons.

Mr. *President*. I dismissed the appellants' bill,

1. Because the crown having granted to the patentees *jointly*, no *intention* of the patentees to hold *in common * 330
can vary the nature of the estate, either at law or equity,

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from that created according to the intent of the crown, expressed in the grant.

There is no intent that it should be otherwise expressed in the grant. The estate was in *joint-tenancy*. Their intention to hold as tenants in common, the estate which passed to them by the grant, cannot sever the estate that was in joint-tenancy.

2. Because the patentees paid equal proportions of the purchase-money to the *Indians*. This always makes a joint-tenancy in equity, where the estate is joint in law. The reason of this is founded on what is laid down in some of the books; namely, that it seems to be the doctrine of the court of equity, that where two or more purchase land, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, this is a joint-tenancy; that is, a purchase of them jointly, of the chance of survivorship, which may happen to one as well as the other; but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and, however the legal estate may survive, yet the survivor shall be considered but as trustee for the others, in proportion to the sums advanced by each of them.'

It has already been intimated, that the patentees' having contributed equally in the *expense* of acquiring the land, was sufficient for the implication of a compact or trust between them, that no advantage was to be taken by survivorship, and, consequently, that the fitness of the rule here cited, might be questioned.

This is not only altogether a refinement, but it is also evi-
* 331 dently erroneous; because, in order to equality *in chance of survivorship, there ought to be equality of age, as much as equality of contribution: to this may be added, that the correctness of a court of equity would require, that the presumption that persons ever act on a calculation of chance or luck, ought to be considered as rather odious, and, therefore, never to be assumed as a ground of decision.

3. Because, if the supposed trust is founded on any agreement between the original patentees, their heirs should have been parties to the suit, since they might, probably, have been called to show, that the conveyance to the eldest son, was conformable to the very terms of the agreement.

4. Because the legal estate being in the defendants, and no express trust appearing, the complainants should show such an implied trust as is clearly out of the statute of frauds.

5. Because the present defendants are *bona fide* purchasers, without notice of the claim of the complainants, *Bleeker's* testimony being inconclusive, as to the point of notice, particularly after so great a lapse of time, and the death of all the parties.

6. Because, there being no evidence of fraud, or of the commencement of a suit by *Volchert Van Vechten* as set forth in the bill, and on which alone the court of appeals overruled the demurrer, and the estate having been held, for upwards of eighty years, by the purchasers under *Johannes*, without any suit or legal demand upon them; the court will not, after such a lapse of time, suffer them to be dispossessed by an implied trust, particularly as the estate has, probably, with many others in this country, *increased one hundred fold by the improvements thereon within that period. * 332

Per Curiam, delivered by BENSON, J. As to the question of fact above stated, it is not requisite to say more, than that the evidence at least preponderates in favour of the supposition, that the conveyance of the 30th *October*, 1741, although there might have been some pecuniary confederation for it, as from *Brees*, *Bradt* and *Van Beuren*, yet, that the greater inducement or consideration as from *Johannes*, was relationship. This rendered it more a gift than a sale. It appears, that *Brees*, *Bradt* and *Van Beuren* then knew of the will of *G. T. Van Vechten*, and of the con-

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veyance from the surviving patentees to *Johannes*, so that the conveyance from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, was not only voluntary, but they took with a notice of the right of *Volchert*, and either the one or the other is sufficient for the appellants.

Although the evidence is mentioned as preponderating only, the inference is not, therefore, intended to be, that if it was necessary, it could not be shown to be perfectly satisfactory.

As to the question of law, or right between the parties, it is to be observed, that a use is a right in one person, to have the use or profits or beneficial interest of land, and another person to have the right; that is, to be the legal, or formal possessor or tenant of it. These uses were borrowed from the civil law, and introduced at first by the clergy, to evade the statutes of mortmain by procuring a natural person to hold the land, but to the use of the corporate or politic persons, the monastery, or religious house. This *contrivance was afterwards used as a means to enable persons to devise, and also to prevent forfeitures by *cestui que use*.

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The land itself could not be devised, but the use might; the land was forfeitable for crimes, but the use was not; the only remedy for *cestui que use*, the person having the right to the use, against his feoffee to use, the person holding the land, if he refused to let him have the use of the land, was in a court of equity. Afterwards, the statute of uses, by annexing the possession to the uses, gave the *cestui que use* a complete remedy at law. This produced a distinction between executed and executory uses, the former being where the possession is by force of the statute, transferred to the *cestui que use*, so that the feoffee to the use is only, as it were, to forbear or be passive, and the use will execute itself in the *cestui que use;* the latter is where an act is necessary by the feoffee to the use, to execute the use, as to convey over the land, or to receive and pay over the profits, &c. and since the statute, executory uses have

been more generally distinguished by the appellation of trusts, which hath produced different appellations for the parties; the feoffee to the use is called the trustee; the *cestui que use* is called the *cestui que trust*. The execution of trusts can be still compelled in equity only, and are there subject to the like rules with uses at law; they are assignable; they are transmissible by descent and devise, and, which is peculiarly to be attended to in the present case, the possession of the trustee is the possession of the *cestui que trust*, and the rights of the latter may be barred by the statute of limitations, in like manner as *uses or titles at law. But trusts are implied or expressed; implied trusts are such as arise from the case, which is, therefore, the fact, and the trust is the right arising from that fact; express trusts not being to be deduced from the case itself, must be declared. No particular form, however, is requisite in declaring them, and they may be declared at any time. Before the statute of frauds and perjuries, the evidence of the declaration might have been by *parol;* it must now be by writing. Purchasers for a valuable consideration, from a trustee, do not purchase at their peril against the trust, and, therefore, they will not be adjudged to have purchased, subject to the trust, unless it is proved they had *notice* of it.

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To apply what is here premised to the present case; it might be insisted, that *G. T. Van Vechten* having contributed an equal *fourth* part of the expense in acquiring the land, that fact, therefore, was in itself sufficient to imply an existing trust in favour of him; that he was to have an equal *fourth* part of the land in severalty, and that a court of equity would, accordingly, in case of his death, have compelled the surviving patentee to have conveyed a fourth part to his representatives; by the conveyance, however, from the surviving patentee to *Johannes*, the necessity of recurring to mere implication, for the trust is saved, the recital in that conveyance being a sufficient declaration in evidence, that such trust was expressed between the patentees, and

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coeval with their intention, to acquire the land; it was their true intent, purpose, and meaning, that they should hold as tenants in common, without any advantage by reason of joint-tenancy or survivorship. *The trust, therefore, being an interest devisable, a moiety of the fourth of *G. T. Van Vechten* passed by his will to *Volchert*, and the conveyance from the surviving patentees is to be deemed the act by them in the execution of the trusts; so that *Johannes*, as to a moiety of the lands thereby conveyed to him, took by implication or construction of law, in trust for *Volchert*, and this hath been transmitted to the appellants, his representatives. *Johannes* not having done any act in breach of the trust, or adverse to it, so as to be considered as equivalent to a disseisin at law, until the conveyance of the 30th *October*, 1741, the possession, therefore, of *Johannes* to that time, being to be deemed the possession of *Volchert*, which being within sixty years, when the appellants filed their bill; and that conveyance being voluntary, or they having notice at the time, of the right of *Volchert*, the appellants are, therefore, entitled to a decree for a moiety of the lands. Laches are, nevertheless, so to be imputed to them, that it would not be proper for a court of equity to aid them to recover the rents or profits.

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It will suffice to say, as a general answer to the reasons not specifically replied to, that it is obviously to be collected from what has already been suggested, that with respect to the allegation in the bill, of a suit by *Volchert* against *Johannes* for the recovery of the land, it not being proved, no notice was taken of it on the hearing of this appeal, either by the court or the counsel.

DECREE. On hearing counsel on both sides, on the appeal, in this cause, this court doth adjudge and decree, that the decree of the said court of chancery *in this cause be reversed; and instead thereof, this court doth further adjudge and decree, that the respondents do, by sufficient conveyances, convey to the appellants severally in fee-simple, ac-

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cording to their respective shares or interest therein, as they have in their bill of complaint set forth, their title to the same, under *Volchert Van Vechten*, one of the residuary devisees, named in the will of *Garrit T. Van Vechten*, also in the said bill set forth, an equal undivided moiety of such of the lands, conveyed by *Johannes Van Vechten*, the other residuary devisee, named in the said will, to *Bernardus Bradt*, *Hendrick Brees*, and *Barent Van Beuren*, by conveyance bearing date the 30th day of *October*, 1741, in the said bill mentioned, and held by the said respondents, by title derived from the said *Bernardus Bradt* and *Hendrick Brees*, or either of them, and that the said bill, as far forth as the same prays that the respondents may account for the rents or profits of the said lands, be dismissed. And, except as to the costs intended in the decree of this court on the former appeal between the said parties, that they respectively pay their own costs on this appeal, and which have hitherto accrued in the said court of chancery, and that, as to all such other costs as shall hereafter accrue in the said court of chancery, the respondents pay to the appellants their costs in that behalf to be taxed. And it is ordered, that the said cause be remanded to the said court of chancery, and that all necessary orders and directions be there given for carrying this decree into effect.

Decree of reversal.

Jackson, *ex dem.* Smith, *against* Hammond.

ISRAEL SMITH, being seised in fee of the premises in question, by his will of the 21st *July*, 1774, devised them "to the trustees of the town of *Brookhaven*, and their successors for ever, upon trust and confidence, and to the intent and purpose that they did, and should, after his de-

Our statute of 1784, enabling churches, &c. to incorporate themselves, does not enable them to take lands by a devise.

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cease, rent and hire the same to any person at their will, and pay the rents and hires thereof, after the expiration of the time, during which the same should be legally charged and encumbered with the lawful maintenance and dower of his wife, into the hands of the regular minister and other ruling officers for the time being of the *Baptist Church* of *Christ* at ———." The testator died on the 1st *November*, 1780, and his widow about ten years thereafter.

The trustees of the *Baptist Church* had, from the death of the widow, received the rents and profits of the premises, and the defendant, at the time of the commencement of the suit, held the premises under them. The lessor of the plaintiff was heir to the testator. The trustees of the town of *Brookhaven* were, at the time of making the will, and then were a corporation capable to take and hold lands. The question was, "is the plaintiff entitled to recover?"

Per Curiam, delivered by BENSON, J. By the law of *England*, and which, as such, became the law of the colonies, lands were devisable in virtue only of the statute of *Hen.* VIII. commonly known as the *statute of wills*. *Special* customs were exceptions to the common or *general* law; but, being *local*, they formed no part of our law, and the
* 338 right or *power to devise, granted by the statute, being expressly limited or restricted from extending to a right or power to devise to *corporations*, the devise in the will of *Israel Smith* to the trustees of *Brookhaven*, ought, therefore, to be adjudged void; so, that on his death the lands descended to the lessor of the plaintiff as his heir at law. This must be admitted, unless, as is contended for on the part of the defendant, by our statute of the 6th *April*, 1784, enabling *churches*, &c. to incorporate themselves, they are *constructively*, with respect to lands possessed or held by them, *at the time of their incorporation*, made capable to take by *devise;* and that, to that end, the incorporation is to *relate* to the death of the testator, so as to overreach the rights of all others claiming under him.

It must be acknowledged, that if the words *devised* and *devise*, in the 4th section, had either been wholly omitted, or if in the sentence in which they are found, they had been made *expressly* to refer only to *goods* or *chattels*, there would not then have been a possible ground, for a *constructive* capacity in these *corporations* to take and hold *lands* also by devise; the question, therefore, between the parties may be more precisely stated to be, whether the construction contended for is *necessary*, in order to satisfy these words, or to give them their requisite due sense and meaning, considered as predicates or relatives, and the words *lands*, *tenements*, *hereditaments*, *goods and chattels*, considered as subjects or antecedents.

The rule *reddenda sunt singula singulis* is obviously applicable in this case, and by a transposition, equally obvious, the sentence may be made to read "all temporalities, whether the same consist of lands, tenements, hereditaments, goods or chattels, *given* or **granted*, or of goods or chattels *devised*," &c. whereby a perfect, although a less extensive sense and meaning, will be given to the word *devised*, and its concomitant *devise*, and the sentence will be rendered consistent both with itself and with law, and especially with the concluding sentence in the section, "that the trustees shall hold the *church* and *lands* thereunto belonging, by whatsoever name or person the same were purchased or had, or to them given or granted, *in as full a manner as if they had been legally incorporated, and made capable to take, receive, purchase, have, hold, use and enjoy the same.*" * 339

The only manner in which, had they been incorporated, they were capable of taking, &c. being by *gift* or *grant*, and not by *devise*, it is, therefore, not unworthy of notice, that in the latter sentence the word *devise* is omitted, and the words, *given or granted* only used, to which may be added, that if the construction contended for by the defendant is to obtain, then this consequence will follow, that the legislature must be supposed to have intended to give to

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a *church* a capacity to *hold* lands *taken* or acquired as it were before their incorporation, and refuse to them a capacity to *take* and consequently to hold lands acquired after their incorporation, and without a reason for the discrimination; for, whether the acquisition was *before* or *after* the incorporation, or whether it was by *gift or grant* or by *devise*, was immaterial, as long as the value was within the sum limited by the statute. As to the argument deduced from the expression in the statute, "although such gift, grant or devise may not have *strictly* been agreeable to the *rigid* rules of law," and that the restriction or limitation in the statute of wills from devising to *corporations* *is to be considered in the nature of a *strict* or *rigid* rule of law, and, therefore intended to be dispensed with by these provisional expressions, it would be sufficient to observe, that it is only colourable at best.

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I will, however, in answer, state, that if the will in the present instance had, after the possession and incorporation of the *Baptist Church*, the *cestui que trust* in it, been discovered to have been attested by only *two* witnesses, the heir at law would be entitled to recover the lands; this I assume, as unnecessary to be demonstrated, and, therefore, if the expressions cited were not competent to *cure* a mere *imperfection* in the devise, surely they must be less so wholly to *create* a devise; if they must yield to the rule, and of questionable utility in the statute of frauds, much more must they yield to the rule confessedly highly provident in the statute of wills. I will only add, that supposing the statute of *Hen.* VIII. never to have passed, and that we had not had, as was the fact, any statute of wills of our own, till the present one of 1787, would the incorporating statute now under consideration, in such case, have been deemed *impliedly* to *alter* the common law, so far as to give a right to *devise* to a *church*, congregation, or other religious society only? if not, and the statute of *Hen.* VIII. having passed, and with the *express* restriction or limitation already mentioned, should we now, therefore, decide for

the defendant, will it not follow from the decision, that terms less explicit and less forcible will suffice for an *implied* enlargement or extension of an *express* restriction or limitation in a grant of a right or power, than for an *implied* right or power, no otherwise to be considered as prohibited, except as *it hath never been *positively* granted? * 341
Where shall we find the rule or principle for the difference in this respect in the two cases? My opinion is, that the words *devised* and *devise* in the statute, refer only to *goods and chattels*, and that to make them refer also to *lands, tenements, and hereditaments*, would be a construction too extensive to be warranted by law, and consequently that there must be judgment for the plaintiff.

Judgment for the plaintiff accordingly.

(SUPREME COURT.)

Browne and others *against* Robinson and Hartshorne.

ON a motion, by the defendant, to set aside the verdict in this cause, Mr. Justice LEWIS, before whom it was tried at the *October* term, 1799, made the following report:

" This was an action of *assumpsit* for iron sold and delivered by the plaintiffs to the defendants. Plea, the general issue. At the trial, the plaintiffs produced, as a witness, *Henry B. Franklin*, late a clerk of *Nicholas Cooke*, formerly of the city of *New-York*, merchant, deceased, who proved, that the iron mentioned in the declaration, was consigned by the plaintiffs to *Cooke*, to be sold by him, as their factor. That on or about the 7th day of *November*, 1796, as nearly as the witness could recollect, *Cooke* sold the iron to the defendants for the sum of 1,080 dollars, payable at seventy days; but at the time of such sale, no notice was given to

Where goods are sold by a known factor of a house, a set-off cannot be made against them by the purchaser, for a debt due from the factor in his own right, if the goods be actually those of his principal, though the factor do carry on business for himself, and nothing be said at the time of sale respecting the ownership of the goods. On a sale by the known factor of a house, the principal may immediately maintain an action aginst the vendee. Factors in *New-York* may, by custom, sell on a credit, at the risk of their principal.

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the defendants (nor was any evidence offered, to show *that they knew) that the sale was made by *Cooke*, as factor or agent, for the plaintiffs, or any other persons. He testified, however, that it was *generally known* that *Cooke* was factor to the plaintiffs; but that he then transacted

* 342 business as well on his own account, as upon commission.

"That after the delivery of the iron, and before the death of *Cooke*, the witness, as his clerk, called upon the defendants with a bill of parcels for the same, and requested their note for the amount, which they refused to give, alleging, that they held a note given to them by *Cooke*, for nearly the same amount, which would fall due about the same time, and that they intended to set it off against the amount of the iron. They at the same time showed the note to the witness.

"That *Cooke* was, at the time of the sale, and until, and at his death, indebted to the plaintiffs in the sum of 20,000 dollars and upwards. That after his death, and before the expiration of the credit of seventy days, one of the plaintiffs called with the witness, upon the defendants, and informed them that the iron was sold by *Cooke*, as factor of the plaintiffs, and, at the same time, gave notice, that they should expect payment of the same, upon which, one of the defendants answered to the plaintiff, that he did not know him, and would not pay him. It also appeared, that one of the plaintiffs, after the above conversation, became the administrator of *Cooke's* estate. It was also proved, that it is the custom of *New-York* for factors to sell on credit at the risk of the principal, and that it was the uniform usage in *Cooke's* store, to sell agreeably to such custom, and

* 343 *that in this case, the goods were sold at the plaintiffs' risk upon the commou commission in such cases. The plaintiffs there rested their cause, and the defendants moved for a nonsuit, upon the ground that no offer of indemnity against the claims of *Cooke*, or his representatives, had been made by the plaintiffs to the defendants, which motion was overruled by the judge.

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"On the part of the defendants, evidence was then offered to be produced, that at the time of the sale of the said goods, and notice to pay the plaintiffs, they held *Cooke's* note, dated the 22d *July*, 1796, for 1,080 dollars and 25 cents, payable in six months after the date, and that they had since held, and still did hold it, which note was intended to be offered as payment. This evidence was objected to by the counsel for the plaintiffs, as inadmissible under the present issue, and that it would be equally so, if a notice had been annexed to the plea. Whereupon the judge rejected that evidence, and directed the jury, that the law was with the plaintiffs, and that the note of *Cooke* could not be set off under this issue. Upon which, the jury found a verdict for the plaintiffs for the price of the iron, with interest, from the expiration of the seventy days credit."

Per Curiam. Where goods are purchased from a factor *scienter*, with intent by the purchaser, to set off against the purchase, a demand which he may have against the *factor*, the principal may, in such case, and as on a sale made *immediately* by himself, have a suit against the *purchaser*, at any time before payment to the *factor*, every purchase so made with *intent solely thereby to obtain payment or security from the *factor* being, as against the *principal*, *fraudulent*. * 344

Motion refused.

(Court of Errors.)

William Laight and others, *against* John Morgan and others.

Where a bill seeks an examination of witnesses *de bene esse*, on account of age, &c. an affidavit of the facts on which the application is founded, is necessary. So on a bill to have a title established, and for quiet possession; for whenever a bill seeks to transfer a matter cognisable by law to chancery, an affidavit of the facts, on which it is required, should be stated. When a bill requires an affidavit to some parts and not to others, a demurrer to the whole for want of that affidavit is bad.

THE substance and points in this case are so well stated in the decision of the court, that it is unnecessary to do more than give the opinion on which it was pronounced.

Kent, J. The bill of complaint in the cause appears to have had three objects, viz.

To obtain a discovery of facts from the defendants; to perpetuate testimony; and to obtain specific relief.

Upon the demurrer to the whole bill, there were seven causes of demurrer assigned. The three last causes were assigned in the same words as in the similar case of *Le Roy and others* v. *Service and others*, which was before the court the last year, and by the decision then, are to be deemed as having been overruled. The fourth cause of demurrer was abandoned by the counsel for the respondents upon the argument as untenable. If the third cause be not equally so, it is, perhaps, not material in the present case, since, as I shall presently show, the decision of this cause finally depends upon this single point, viz. if *any part* of the bill requires an answer, is a demurrer to the *whole* bill good?

I confine myself, therefore, to the consideration of these two questions, as arising out of the two first causes of demurrer.

* 345 *1. To what objects, if any, in the bill, was an affidavit requisite.

2. If not for every object, is a demurrer to the whole bill, for the want of such affidavit, maintainable?

1. The bill alleges the loss of papers material to the complainant's title, and seeks a discovery concerning them from

the defendants. This is a matter within the ordinary and proper jurisdiction of a court of equity, and so far it is conceded that the bill did not require an affidavit. The bill further seeks for the examination *de bene esse* of witnesses, who are alleged to be aged or infirm, or resident abroad, and for this purpose, I conceive that an affidavit was requisite, by the practice of the court, stating generally the age, infirmity, and place of residence of the witnesses, and as no affidavit of this kind was put in during any stage of the cause, a demurrer to that part of the bill might have been good. The bill finally prays to have the title of the complainants to two tracts of land established, and quiet possession given to them. This is a matter properly of legal jurisdiction, and relievable by the courts of common law; and, for this reason, I deem an affidavit to the truth of the material facts stated in the bill, to have been requisite.

It appears to me to be an established, as well as a reasonable and fit rule, that whenever a bill seeks to transfer to chancery, a question properly cognisable by the courts of law, the facts rendering such transfer proper, must be verified by oath; so that a suitor shall not, upon mere suggestion or pretext, break in *upon and disturb the settled boundaries of the courts of justice. * 346

As, therefore, the bill in respect to one object, the discovery, did not require an affidavit, and in respect to the other two objects, to wit, the examination of witnesses, and the relief, did require one, this leads me to consider,

2. The second question, viz. whether a demurrer to the whole bill, for the want of such affidavit, be good.

It is an established and convenient rule of pleading, in chancery, that you may meet a complainant's bill by several modes of defence. You may demur to one part, answer to another, plead to a third, and disclaim to a fourth part of the bill. If, therefore, a bill seeks a discovery of a matter which is proper, and likewise seeks discovery of other matter, which is not proper; as, for instance, matter which would charge the defendant with a crime, the de-

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fendant must answer to the proper, and may demur to the improper questions put to him, or he may answer to the proper questions, taking no notice of the residue. So, if a bill, as in the present case, seeks for a discovery, and also for relief, consequential to such discovery, the bill being good for the one object, without affidavit, and not for the other, the defendant ought to meet the *sound* part of the bill by an answer, and be left to his own option whether he will demur or not to the other part.

I do not find any authoritative rule declaring that if a bill be bad in part only, and good in other parts, the whole bill thereby becomes vitiated, and will be dismissed on a general demurrer. The settled rule is most assuredly otherwise, and a bill, combining *discovery and relief, without affidavit, though liable to demurrer, as to the relief sought, shall, nevertheless, be retained and supported for the purpose of discovery.

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A different rule would be very inconvenient and unnecessarily grievous. To support a demurrer to a whole bill, when part of it, had that part been separate and distinct, would have required an answer, is to send a party back to travel the same ground over again, with much expense and loss of time, and to no useful purpose. He must file the same bill anew, with the omission only of the exceptionable prayers, and repeat the former process for bringing the defendant into court, who, when he arrives, will be in no better situation than he was before; since the same answer which might have been sufficient, and the same consequences which the defendant might have commanded *then*, must follow *now*.

I am, accordingly, of opinion, that the demurrer which, instead of being confined to the exceptionable parts of the bill, went to the whole bill, ought to have been overruled, and, consequently, that the decree of the court of chancery, allowing the demurrer of the respondents, and dismissing the bill of the appellants, must be reversed.

Judgment of reversal unanimously.

N. B. LANSING, Ch. J. though he coincided in the judgment of the court, said, that a bill for discovery and relief, without affidavit, was a *nullity*, and a general demurrer to the *whole bill good.*

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*Ludlow *against* Dale.

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The opinion of Mr. Justice KENT, *in this cause, having been referred to in his argument on the conclusiveness of foreign sentences,† is given now, as it was not till the preceding sheet was worked off, that it came to the hands of the compiler.*

†*Ante, p.* 259.

THIS was an action on a policy of insurance on the schooner *Paragon* and her cargo, from *Aux Cayes*, or any other port in *Hispaniola*, to the *United States*, and *warranted American.* The insurance was effected for *Moses Myers*, of *Virginia*, and the vessel was captured by a *British* frigate on her return from *St. Domingo*, laden with the produce of that island, and was carried into *Jamaica;* and by the vice-admiralty court of that island was condemned as good and lawful prize.

Two questions have arisen on this case.

1. Whether the sentence of the admiralty concludes all further inquiry respecting the neutrality of the property.

2. If it does not, whether the testimony offered appears to warrant the sentence of condemnation at *Jamaica.*

When this cause was argued at the last *July* term, I observed, with some surprise, that the counsel on each side, seemed in a great degree to abandon the first point, and taking it for granted, that the question on the warranty was still open, they entered fully, and, I think, with much force and ability, into a discussion of the several *matters of fact*, on which the proceedings in the admiralty must have been founded. I shall, however, confine myself to

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the consideration of the first question, because, in my opinion, that *alone* governs the cause. If the sentence *of condemnation by a foreign court of admiralty, be conclusive, over the question of neutral property, it is unnecessary to examine any further. If it be not conclusive, and the question is still open for discussion, it is then a question of fact to be submitted to a jury, and we have nothing to do with it, other than to send it back to the proper tribunal.

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2 *Ersk.* 734. 2 *Str.* 733. 3 *Durnf.* 125. 12 *Viner*, 95. 133. 128, 129. *Str.* 1078. 3 *Mod.* 194, 195.

It is a clear and settled principle of law, that the sentence of a court of competent jurisdiction is, as to the direct point under decision, conclusive upon all other courts of the state, within whose limits it be pronounced.

2 *Ersk.* 735. 4 *Durnf.* 185. 192. *Str.* 733. 2 *Kaims*, 365. 376. 1 *Black. Rep.* 258. 260.

Even *foreign* decrees, whether sustaining a claim or dismissing it, are generally, from a regard to utility, and *ex comitate*, received with respect, and held binding, unless there be some very cogent reasons against them, by the regular tribunal of all other nations, where the administration of justice is orderly and civilized.

Doug. 610. 614, 615. 617. 2 *Kaims*, 376. 3 *Durnf.* 330.

But the sentence of foreign courts of admiralty, are especially received as binding, because they proceed upon general principles of the law of nations, applicable to all suitors, and of universal extent and reception. As these courts are all governed by one and the same law, equally known to every country, and equally open to all the world, all persons are, therefore, concluded by their sentences, in cases within their jurisdiction. We find, accordingly, the *English* courts, as early as the reign of *Charles* II. regarding the decision of the *French* admiralty in a question of *prize*, as *conclusive* upon them, though at that time *England* was a neutral, and *France* a belligerent power, and the judges observed, that sentences in courts of admiralty ought to bind generally, according to the *jus gentium*.

Hughes v. *Cornelius*, *Kaims*, 473. 2 *Show.* 242. *Skinn.* 59.

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2 *Ld. Raym.* 893. 935. *Carth.* 82. See also, 1 *Atk.* 49. *and* 2 *Woodd.* 455.

*Lord *Holt* more than once recognised this law, and gave it the sanction of his great name.

In modern times, when the law of nations and commercial law, have been more correctly defined, the doctrine,

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that sentences of foreign admiralties were conclusive, has been admitted in the fullest latitude, and the *English* court of K. B. have repeatedly and unanimously decided, that condemnation in a foreign court of admiralty, of property warranted neutral, as enemy's property, was conclusive evidence against the insured, of a breach of his warranty.

Bernardi v. *Motteux*, *Doug.* 575. *Barzillay* v. *Lewis*, *Park*, 359. *De Souza and Ewer*, *Park*, 361. *Salaucci* v. *Wooddmason*, *Park*, 362. *Mayne* v. *Walter*, *Park*, 363. *Fernandez* v. *Da Costa*, *Park*, 178.

These several decisions, while they incontrovertibly establish the doctrine, that if no special ground of condemnation appears, but the property is condemned generally as *enemy's* property, or as good and lawful prize, other courts are bound to consider the decree as decisive evidence, that the property was not neutral; yet they, at the same time, admit, that if the foreign sentence be so ambiguous as to render it difficult to say on what ground the decision turned, or if there be colour to presume the admiralty proceeded on matter not relevant to the issue, evidence will be let in to explain. So if a sentence be on the face of it unjust, and reasons are given for it, manifestly illegal, and against the law of nations, other courts have a right to judge of these reasons, and to determine on their validity, and this was the amount of the decision of this court in the case of *Smith* v. *Murray* and *Mumford*.

Jan. term, 1797.

The *English* law thus understood and explained, I consider as no novel doctrine, but a part of the common law of the land. It is, indeed, the prevailing usage of all countries, whose jurisprudence is enlightened, and whose administration is regular. It could not exist in the *civil law*, because the whole *known world was subject to the *Roman* empire; but in countries where the civil law has been adopted and modified, the same principle prevails, and a person condemned by a sentence of a foreign court, confessedly competent in the case, can have no redress, but by a court which has power to reverse the decree.

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2 *Kaims*, 366. 2 *Ersk.* 735.

The decree of the admiralty of *Jamaica* cannot be said to be *res inter alios acta*. The assured, in the present case, was a party to the suit instituted, and the condemnation had there; he applies here to have the same question agitated

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there, and which was decided against him, tried anew; the question, whether his property, which he had warranted to be *American*, had the requisite *insignia* to entitle it to the privilege of neutrality.

I shall forbear to give any opinion on the testimony which was produced and commented upon at the argument, because I am of opinion it is totally irrelevant in the present case, and that the sentence of condemnation being direct, so as to induce a necessary conclusion that neutral or enemy's property was the point in issue and decided; and containing nothing which appears contrary to the law of nations, is decisive against the plaintiffs, and that judgment ought to be rendered for the defendants.

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THE END.

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